

**ALASKA STATE LEGISLATURE  
JOINT MEETING  
HOUSE RULES STANDING COMMITTEE  
SENATE SPECIAL COMMITTEE ON ENERGY**

July 13, 2008  
12:34 p.m.

**MEMBERS PRESENT**

HOUSE RULES

Representative John Coghill, Chair  
Representative John Harris (AGIA Subcommittee, Chair)  
Representative Anna Fairclough  
Representative Craig Johnson  
Representative Ralph Samuels (AGIA Subcommittee)  
Representative Beth Kerttula (AGIA Subcommittee)  
Representative David Guttenberg

SENATE SPECIAL COMMITTEE ON ENERGY

Senator Charlie Huggins, Chair  
Senator Bert Stedman, Vice Chair  
Senator Kim Elton  
Senator Lyda Green  
Senator Lyman Hoffman  
Senator Lesil McGuire  
Senator Donald Olson  
Senator Gary Stevens  
Senator Joe Thomas  
Senator Bill Wielechowski  
Senator Fred Dyson  
Senator Thomas Wagoner

**MEMBERS ABSENT**

HOUSE RULES

All members present

SENATE SPECIAL COMMITTEE ON ENERGY

All members present

**OTHER LEGISLATORS PRESENT**

Senator Con Bunde; Senator Betty Davis; Senator Johnny Ellis; Senator Hollis French; Senator Gene Therriault; Senator Gary Wilken; Senator Lesil McGuire; Representative Bob Buch; Representative Mike Chenault; Representative Harry Crawford; Representative Nancy Dahlstrom; Representative Andrea Doll; Representative Mike Doogan; Representative Bryce Edgmon; Representative Richard Foster; Representative Les Gara; Representative Berta Gardner; Representative Carl Gatto; Representative Max Gruenberg; Representative Mike Hawker; Representative Lindsey Holmes; Representative Kyle Johansen; Representative Reggie Joule; Representative Steve Kawasaki; Representative Wes Keller; Representative Mike Kelly; Representative Gabrielle LeDoux; Representative Bob Lynn; Representative Mike Meyer; Representative Mark Newman; Representative Kurt Olson; Representative Jay Ramras; Representative Woodie Salmon; Representative Paul Seaton; Representative Bill Stoltze; Representative Bill Thomas.

#### WITNESS REGISTER

Keith Bergner, Lawson Lundell, LLP; Tony Palmer, Vice President, Alaska Business Development, TransCanada; Donald Bullock, Attorney, Legislative Legal Services; Tam Cook, Director, Legislative Legal Services, Legislative Affairs Agency; Steve Porter, Legislative Consultant, Legislative Budget and Audit Committee, Legislative Affairs Agency; Dan Dickinson, Consultant, Tax Division, Department of Revenue; Pat Galvin, Commissioner, Department of Revenue; Loyola Keough, Bennett Jones LLP; Bonnie Harris, Senior Assistant Attorney General, Department of Law.

#### **COMMITTEE CALENDAR**

##### HOUSE BILL NO. 3001

"An Act approving issuance of a license by the commissioner of revenue and the commissioner of natural resources to TransCanada Alaska Company, LLC and Foothills Pipe Lines Ltd., jointly as licensee, under the Alaska Gasline Inducement Act; and providing for an effective date."

- HEARD AND HELD

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- HEARD AND HELD

**PREVIOUS ACTION**

BILL: SB3001

SHORT TITLE: APPROVING AGIA LICENSE

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

06/03/08 (S) READ THE FIRST TIME - REFERRALS  
06/03/08 (S) ENR  
06/03/08 (S) REPORT ON FINDINGS AND DETERMINATION  
06/04/08 (S) ENR AT 10:00 AM TERRY MILLER GYM  
06/04/08 (S) Heard & Held  
06/04/08 (S) MINUTE(ENR)  
06/05/08 (S) ENR AT 9:00 AM TERRY MILLER GYM  
06/05/08 (S) Heard & Held  
06/05/08 (S) MINUTE(ENR)  
06/06/08 (S) ENR AT 10:00 AM TERRY MILLER GYM  
06/06/08 (S) Heard & Held  
06/06/08 (S) MINUTE(ENR)  
06/07/08 (S) ENR AT 10:00 AM TERRY MILLER GYM  
06/07/08 (S) Heard & Held  
06/07/08 (S) MINUTE(ENR)  
06/08/08 (S) ENR AT 1:00 PM TERRY MILLER GYM  
06/08/08 (S) Heard & Held  
06/08/08 (S) MINUTE(ENR)  
06/09/08 (S) ENR AT 10:00 AM TERRY MILLER GYM  
06/09/08 (S) Heard & Held  
06/09/08 (S) MINUTE(ENR)  
06/10/08 (S) ENR AT 10:00 AM TERRY MILLER GYM  
06/10/08 (S) Heard & Held  
06/10/08 (S) MINUTE(ENR)  
06/12/08 (S) ENR AT 10:00 AM FBX Carlson Center  
06/12/08 (S) Heard & Held  
06/12/08 (S) MINUTE(ENR)  
06/13/08 (S) ENR AT 10:00 AM FBX Carlson Center  
06/13/08 (S) Heard & Held  
06/13/08 (S) MINUTE(ENR)  
06/14/08 (S) ENR AT 10:00 AM FBX Carlson Center  
06/14/08 (S) Heard & Held  
06/14/08 (S) MINUTE(ENR)  
06/16/08 (S) ENR AT 9:00 AM ANCHORAGE  
06/16/08 (S) Heard & Held

06/16/08 (S) MINUTE(ENR)  
 06/17/08 (S) ENR AT 9:00 AM ANCHORAGE  
 06/17/08 (S) Heard & Held  
 06/17/08 (S) MINUTE(ENR)  
 06/18/08 (S) ENR AT 9:00 AM ANCHORAGE  
 06/18/08 (S) Heard & Held  
 06/18/08 (S) MINUTE(ENR)  
 06/19/08 (S) ENR AT 9:00 AM ANCHORAGE  
 06/19/08 (S) Heard & Held  
 06/19/08 (S) MINUTE(ENR)  
 06/20/08 (S) ENR AT 9:00 AM ANCHORAGE  
 06/20/08 (S) 9am - 5pm - Testimony <Invitation Only>  
 06/24/08 (S) ENR AT 1:00 PM MAT-SU  
 06/24/08 (S) Heard & Held  
 06/24/08 (S) MINUTE(ENR)  
 06/26/08 (S) ENR AT 1:00 PM KENAI  
 06/26/08 (S) Heard & Held  
 06/26/08 (S) MINUTE(ENR)  
 07/01/08 (S) BILL CARRIES OVER FROM 3RD SPECIAL SESSION  
 07/01/08 (S) ENR AT 9:00 AM BARROW  
 07/01/08 (S) Heard & Held  
 07/01/08 (S) MINUTE(ENR)  
 07/08/08 (S) ENR AT 1:00 PM KETCHIKAN  
 07/08/08 (S) Heard & Held  
 07/08/08 (S) MINUTE(ENR)  
 07/09/08 (S) ENR AT 1:30 PM TERRY MILLER GYM  
 07/09/08 (S) Heard & Held  
 07/09/08 (S) MINUTE(ENR)  
 07/10/08 (S) ENR AT 8:00 AM TERRY MILLER GYM  
 07/10/08 (S) Heard & Held  
 07/10/08 (S) MINUTE(ENR)  
 07/11/08 (S) ENR AT 9:00 AM TERRY MILLER GYM  
 07/11/08 (S) Joint w/(H) Rules  
 07/12/08 (S) ENR AT 9:00 AM TERRY MILLER GYM  
 07/12/08 (S) Joint w/(H) Rules  
 07/13/08 (S) ENR AT 12:30 AM TERRY MILLER GYM

BILL: HB3001

SHORT TITLE: APPROVING AGIA LICENSE

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

06/03/08 (H) READ THE FIRST TIME - REFERRALS  
 06/03/08 (H) RLS  
 06/03/08 (H) WRITTEN FINDINGS & DETERMINATION  
 06/04/08 (H) RLS AT 9:00 AM CAPITOL 120  
 06/04/08 (H) Subcommittee Assigned  
 06/04/08 (H) RLS AT 10:00 AM TERRY MILLER GYM

06/04/08 (H) Heard & Held  
 06/04/08 (H) MINUTE(RLS)  
 06/05/08 (H) RLS AT 9:00 AM TERRY MILLER GYM  
 06/05/08 (H) Heard & Held  
 06/05/08 (H) MINUTE(RLS)  
 06/06/08 (H) RLS AT 10:00 AM TERRY MILLER GYM  
 06/06/08 (H) Heard & Held  
 06/06/08 (H) MINUTE(RLS)  
 06/07/08 (H) RLS AT 10:00 AM TERRY MILLER GYM  
 06/07/08 (H) Heard & Held  
 06/07/08 (H) MINUTE(RLS)  
 06/08/08 (H) RLS AT 1:00 PM TERRY MILLER GYM  
 06/08/08 (H) Heard & Held  
 06/08/08 (H) MINUTE(RLS)  
 06/09/08 (H) RLS AT 10:00 AM TERRY MILLER GYM  
 06/09/08 (H) Heard & Held  
 06/09/08 (H) MINUTE(RLS)  
 06/10/08 (H) RLS AT 10:00 AM TERRY MILLER GYM  
 06/10/08 (H) Heard & Held  
 06/10/08 (H) MINUTE(RLS)  
 06/12/08 (H) RLS AT 10:00 AM FBX CARLSON CENTER  
 06/12/08 (H) Heard & Held  
 06/12/08 (H) MINUTE(RLS)  
 06/13/08 (H) RLS AT 10:00 AM FBX CARLSON CENTER  
 06/13/08 (H) Heard & Held  
 06/13/08 (H) MINUTE(RLS)  
 06/14/08 (H) RLS AT 10:00 AM FBX CARLSON CENTER  
 06/14/08 (H) Heard & Held  
 06/14/08 (H) MINUTE(RLS)  
 06/16/08 (H) RLS AT 9:00 AM ANCHORAGE  
 06/16/08 (H) Heard & Held  
 06/16/08 (H) MINUTE(RLS)  
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 06/20/08 (H) RLS AT 9:00 AM ANCHORAGE  
 06/20/08 (H) Heard & Held  
 06/20/08 (H) MINUTE(RLS)  
 06/24/08 (H) RLS AT 1:00 PM MAT-SU  
 06/24/08 (H) Heard & Held  
 06/24/08 (H) MINUTE(RLS)

06/26/08 (H) RLS AT 1:00 PM KENAI  
06/26/08 (H) Heard & Held  
06/26/08 (H) MINUTE(RLS)  
07/01/08 (H) RLS AT 9:00 AM BARROW  
07/01/08 (H) Heard & Held  
07/01/08 (H) MINUTE(RLS)  
07/02/08 (H) BILL CARRIES OVER TO FOURTH SPECIAL SESSION  
07/08/08 (H) RLS AT 1:00 PM KETCHIKAN  
07/08/08 (H) Heard & Held  
07/08/08 (H) MINUTE(RLS)  
07/09/08 (H) RLS AT 1:30 PM TERRY MILLER GYM  
07/09/08 (H) Heard & Held  
07/09/08 (H) MINUTE(RLS)  
07/10/08 (H) RLS AT 8:00 AM TERRY MILLER GYM  
07/10/08 (H) Heard & Held  
07/10/08 (H) MINUTE(RLS)  
07/11/08 (H) RLS AT 9:00 AM TERRY MILLER GYM  
07/11/08 (H) House Special Subcommittee on AGIA  
07/12/08 (H) RLS AT 9:00 AM TERRY MILLER GYM  
07/12/08 (H) House Special Subcommittee on AGIA  
07/13/08 (H) RLS AT 12:30 AM TERRY MILLER GYM

#### ACTION NARRATIVE

##### CALL TO ORDER

SENATOR CHARLIE HUGGINS called the joint meeting of the House Rules Standing Committee and the Senate Special Committee on Energy to order at [12:36:08 PM](#).

HB 3001-APPROVING AGIA LICENSE

SB 3001-APPROVING AGIA LICENSE

[NOTE: Technical difficulties experienced during the meeting necessitated recording the meeting to FTR from Gavel to Gavel. The meeting is recorded in FTR in its entirety, and the meeting minutes reflect the actual meeting; however, although the time stamps below will lead to the correct position in the recording, the time stamps do not correspond with the actual historical times of the meeting. For example, the meeting ended at 5:30 p.m. in real time, while the time stamps say the meeting adjourned at 4:51 p.m.]

#### ACTION NARRATIVE

KEITH BERGNER, LAWSON LUNDELL, LLP, BRITISH COLUMBIA, listed his credentials in aboriginal and Canadian regulatory law and provided members with a slide presentation ("The Duty to Consult: What Does It Really Mean For Project Proponents," Copy on File). He stated that he is not an advocate for or against any proposed natural gas pipeline. He was present to give information regarding any project in relation to Canadian First Nations.

MR. BERGNER described three different areas in Canada: Areas with no settled claims, areas with historic settled claims from the 1800 and 1900s, and areas with modern settlements that have occurred since 1973. The government's "duty to consult" applies differently in each of those areas.

[12:41:05 PM](#)

MR. BERGNER reviewed Slide 4, mapping various treaties in Canada, with white sections depicting areas with no historic settlements. Slide 5 shows the various asserted claims currently under negotiation in British Columbia. Slide 6 shows the Yukon Territory and overlapping claims by neighboring First Nations. A number of the claims have been settled by modern treaties. He pointed out two unsettled claims.

MR. BERGNER observed that in 2004 the Canadian Supreme Court ruled that the Crown (the government of Canada) has a duty to consult with First Nations before issuing a permit or license or authorization that has the potential to adversely impact an asserted claim. This applies to federal, provincial, and territorial governments; the legal duty does not extend to third parties such as project proponents. However, in practice, the proponents have been carrying the greater share of the burden.

[12:46:02 PM](#)

MR. BERGNER returned to Slide 4 and spoke to the green areas on the map. There is a legal duty to consult where there is no treaty or settlement. The green areas are historic treaties established between 1871 and 1923. He highlighted Treaty No. 8, signed in 1899, that covers the area known today as Alberta. The treaty says the aboriginal title to that land is ceded in exchange for certain rights, including subsistence rights throughout the entire area,

except those tracts that may be taken out for settlement, mining, lumbering, and other purposes, including oil and gas. Canadian courts ruled in 2005 that the Crown has an obligation to consult with First Nations before taking up land.

MR. BERGNER addressed modern land claims. In central Yukon, the claims are covered by modern land claim agreements. These treaties consist of hundreds of pages that detail the rights and obligations of both First Nations and the government. They deal extensively with the process of consultation.

[12:51:26 PM](#)

MR. BERGNER pointed out that the court is still considering the extent of the duty to consult in surrendered, modern treaty lands.

[12:52:19 PM](#)

MR. BERGNER turned to Slide 21. Modern land claims identify three categories of land. Category A. land is owned, including surface and subsurface rights. Category B. lands have surface rights. Slide 23 depicts the Yukon Territory, with dark gray areas showing settled claims. The orange areas show where there are no modern land claims. They have been tentatively identified and temporarily set aside for future land claims settlements.

[12:53:57 PM](#)

MR. BERGNER explained that in Canada there are new legal obligations on the government that the government has not figured out how to address. The result in practice has been that proponents have largely been making agreements, but not because they have to. The duty to consult is not a duty to agree. There is no veto for First Nations and no obligation to reach an agreement, but things go better with agreement. Project proponents have been attempting to make project approvals go faster and eliminate litigation by sidestepping the ambiguous legal standard and negotiating access or impact benefit agreements.

[12:55:47 PM](#)

MR. BERGNER observed that there are a number of common elements in the agreements: Employment opportunities, contracting opportunities, and financial considerations are usually the benefits to First Nations. In exchange, the project proponent gets legal certainty, the assurance that the project will not be challenged legally. Communication is an important component.

[12:57:49 PM](#)

MR. BERGNER emphasized that the alternatives to these agreements are not great: judicial reviews, appeals, injunctions, and potential delays in getting authorization.

[12:58:25 PM](#)

SENATOR FRENCH explained that Mr. Bergner was invited to testify since he was not aligned with either side. He asked if First Nations have taxing authority along the proposed pipeline route.

MR. BERGNER replied that there is taxation authority on settlement lands in British Columbia and Yukon reserves. Otherwise, there is no taxation authority. The proposed natural gas pipeline would not fall on settlement land or reserves.

[1:00:21 PM](#)

SENATOR FRENCH queried the effect of the Alaska Highway on First Nations claims. He asked if it could hold up the project.

MR. BERGNER replied that there was ambiguity, but it was clear that whatever aboriginal rights or title existing on that land have not been exercised. The prior project, the Highway or other existing infrastructure, has impacted and interfered with the exercise of those rights on those particular pieces of land. By definition, any new project using that corridor is going to have a lower impact on the exercise of aboriginal rights. Accordingly, the duty to consult is lessened.

SENATOR FRENCH questioned the position of TransCanada in the Yukon or British Columbia compared with other pipeline builders.

MR. BERGNER reiterated that he does not advocate any particular project. He said any entity would face challenges acquiring permits and authorizations. He felt that TransCanada would have an advantage because of authorizations they already have, though he could not estimate how much time that advantage would save.

[1:03:43 PM](#)

SENATOR FRENCH queried TransCanada's history in reaching agreements with First Nations.

MR. BERGNER observed that TransCanada has successfully managed the challenge to date.

SENATOR FRENCH noted that First Nations issues are nationwide and not unique to the proposed natural gas pipeline.

MR. BERGNER agreed.

[1:04:55 PM](#)

LOYOLA KEOUGH, BENNETT JONES, LLP, CANADA, explained that they were requested to review TransCanada's application. They assessed the challenges the project would encounter and concluded that TransCanada's timeline is aggressive and that there are a number of issues that could cause problems. Bennett Jones estimates that a seven year timeframe would be needed to complete the regulatory review and authorization process. He emphasized that Bennett Jones was not hired to advocate a particular project but to critically challenge and analyze. He stated that there were other First Nations challenges.

[1:07:48 PM](#)

CHAIR SENATOR HUGGINS asked which timeframe figure was used by the Department of Revenue.

PAT GALVIN, COMMISSIONER, DEPARTMENT OF REVENUE (DOR) replied that their analysis factored in Bennett Jones' number. TransCanada's schedule results in first gas in 2018. The DOR estimates first gas based on a range of probability with a mid-point of 2020 for first gas. He stated that TransCanada's estimate was aggressive but within the probability curve.

[1:09:45 PM](#)

REPRESENTATIVE GATTO asked if the timeframe could be longer than seven years.

MR. KEOUGH did not foresee factors that would completely stop the project. He acknowledged that the economics are always a risk. Many things would need to go right to meet a five year timeframe. Experience shows that there will be delays.

[1:12:21 PM](#)

REPRESENTATIVE GATTO asked if TransCanada has a better chance of succeeding as a western Canadian company.

MR. KEOUGH thought TransCanada had advantages because of the structure of the Northern Pipeline Act, their size, and their record, but stated any pipeline company would face challenges with a project of this magnitude.

[1:14:53 PM](#)

REPRESENTATIVE GATTO asked if it was possible for aboriginal groups to re-claim a specific area in order to practice "usual rights" to subsistence activities.

MR. BERGNER said no. He explained that the treaty specifies the ability to continue to practice those rights throughout the entire Treaty 8 tract. Treaty 8 in particular is a huge geographic area. The infrastructure and development that has occurred in it since 1899 has also been large, but there are still enormous tracts of land where aboriginal rights are exercised. There is no provision in the treaty for reclaiming an area and no First Nation has asserted the ability to do that.

[1:16:45 PM](#)

REPRESENTATIVE CISSNA asked if socioeconomic impacts were addressed in negotiations with First Nations.

MR. BERGNER clarified that there were two on-going sets of negotiations, First Nations and government, and First Nations and proponent. Socioeconomic issues play a large role in both. There have been numerous examples where land

claims settlements have included changes to the regulatory structure to include First Nations in the regulatory decision making. This is common in the Northwest Territories where there are provisions for First Nations to nominate members to the regulatory board that makes the decisions. In the negotiations between First Nations and proponent, those agreements are negotiated, so they can cover a multitude of topics. Provision is often made for scholarships or community needs, such as improving soccer fields. That is not something a regulator can order.

[1:20:16 PM](#)

MR. KEOUGH said that agreements have changed over time. Where First Nations might have looked for employment during a project, they are now looking for longer lasting socioeconomic benefits such as infrastructure development.

[1:23:46 PM](#)

MR. KEOUGH elaborated that equity ownership has become an increasingly common request by First Nations. In the Mackenzie Valley pipeline, the Aboriginal Pipeline Group had the opportunity for ownership interest. Similar negotiations are taking place with other planned projects.

MR. BERGNER added that an equity stake has become an increasingly common request. However, there haven't been many agreements ultimately providing for equity interests because it is essentially an investment in the project. Many First Nations communities, which are small, won't make such large investments.

[1:25:20 PM](#)

SENATOR STEVENS asked if there would be off-take points in Canada.

TONY PALMER, VICE PRESIDENT, ALASKA BUSINESS DEVELOPMENT, TRANSCANADA, explained that there were specific provisions in the Northern Pipeline Act (NPA) that require off-takes for a number of communities through the Yukon particularly, in addition to a capital investment.

[1:26:36 PM](#)

SENATOR THOMAS observed that land claims have been on-going. He asked if the rights-of-way were routinely approved.

MR. BERGNER explained that in settling lands claims it has been consistently held that third party interests are not on the table, whether regarding private land, easements, or other interests on Crown land. TransCanada's existing right-of-way is not part of the settlement land.

[1:28:38 PM](#)

SENATOR THOMAS observed that a new pipeline developer would have to start the process over.

MR. BERGNER agreed that a new developer would have to go to the government to acquire rights and access.

[1:29:29 PM](#)

SENATOR WIELECHOWSKI referred to Mackenzie Valley project delays and wondered if TransCanada's project would be similarly affected.

MR. BERGNER acknowledged the Mackenzie Valley project has faced numerous challenges leading to significant delays, including regulatory, First Nations, and negotiating financial terms with the Crown. He thought any pipeline project of a similar scale will be compelled to learn from their lessons.

SENATOR WIELECHOWSKI asked if there were Mackenzie Valley project regulatory issues that would apply.

MR. BERGNER explained that the Mackenzie Valley project tried to incorporate a number of regimes and created a joint review panel. The process was created specifically for that project; an Alaska pipeline project would not have to face the same issues.

[1:32:44 PM](#)

MR. KEOUGH commented on some of the reasons the Mackenzie Valley project has taken as long as they have. There were two separate tracks, the joint review panel dealing with environmental issues, and the National Energy Board (NEB). The process took a long time in the early stages. He added

that typically in a project of such magnitude, there would be a comprehensive filing followed by a written information request process. In the Mackenzie case, the initial filing was subjected to substantial questioning by a variety of parties. The project costs have increased. There are many factors causing delays.

MR. KEOUGH said that an Alaskan project would have the advantage of a better model, including provisions for a single agency to pursue the various approvals and operations that would be needed at the federal level.

[1:36:16 PM](#)

MR. PALMER described differences between the Mackenzie project and TransCanada's proposed project. The Mackenzie project began with nothing completed, while TransCanada already holds a certificate of public convenience and necessity from the NEB for the Alaska project. The Mackenzie project had many regional boards as well as being regulated by the NEB, while TransCanada has a single regulatory agency specifically designed and legislated for the project. In the Mackenzie project, much of the land was owned by First Nations; in addition, there were no pre-existing land rights. TransCanada has held an existing easement for 25 years for the entire length of the Yukon, recognized in all the settled land claims. Finally, Mackenzie has no underlying legislative authority for coordinated decision making. TransCanada has specific legislation, the NPA that is available only to TransCanada.

[1:38:30 PM](#)

SENATOR WIELECHOWSKI stated concerns about issues on the Canadian side that Alaska cannot control. He asked TransCanada's position on those concerns. He asked if Canada would force unreasonable terms.

[1:39:25 PM](#)

MR. BERGNER said he had addressed First Nations challenges. He did not think those issues would stop the project, in spite of the fact that other projects using long stretches of Crown land have experienced added costs and delays.

[1:40:43 PM](#)

MR. KEOUGH added that the Canadian government committed to the Alaskan pipeline project thirty years ago. The Canadian government passed the NPA to address the project. It is an unusual situation, indicating that Canada is earnest and commitments have been and continue to be honored. It is not a new challenge for Canada to build this pipeline.

[1:43:12 PM](#)

SENATOR WIELECHOWSKI pointed out that both U.S. presidential candidates have voiced concerns with oil or tar sands emissions. He referred to concerns that Canadian political leaders could hold the Alaska gasline hostage to extract concessions from the U.S. in order to allow continued export. He inquired if there were political considerations that could stop the project.

MR. KEOUGH stated that they have not provided a detailed evaluation of the political situation. They are aware of the concerns of the U.S. candidates regarding the oil sands. He did not see the advantage to Canada of blocking the project. Alberta wants a good relationship with the U.S. He described legislation called the Transit Pipeline Treaty, which would apply to any pipeline coming from Alaska. It attempts to ensure that a party from another country is not discriminated against. The treaty has been used for decades.

[1:47:29 PM](#)

CHAIR SENATOR HUGGINS asked the ramifications of the phrase "Mackenzie First."

MR. KEOUGH stated that he was not aware of any formal position or policy that would suggest that the Canadian government would want the Mackenzie Valley project to proceed before an Alaskan project. He noticed a decline in the reserves and infrastructure in Alberta; they are looking for a new source of supply. To some degree, decisions will be made on a business basis. Carbon step up will be needed for either project.

MR. BERGNER added that there will be challenges with both projects going at the same time in terms of labor and availability of materials, for example. He was not aware of any formal policy mandating either project first. It did appear for a while that the Mackenzie was making progress

through the process, but he thought the drivers were business rather than political.

CHAIR SENATOR HUGGINS asked TransCanada's position on and relationship to the Mackenzie project.

MR. PALMER stated that TransCanada is a 3 to 5 percent participant in the Mackenzie project and funding about one third of the Aboriginal Pipeline Group development costs. Imperial Oil, an Exxon subsidiary in Canada, would be the lead on the project, along with ConocoPhillips and Shell. He agreed with statements voiced by Mr. Bergner and Mr. Keogh.

MR. PALMER pointed out specific provisions of the treaty on the project that he thought should give comfort. He read the agreement principles applicable to a northern natural gas pipeline, Clause 2, having to do with expeditious construction timeline:

Both governments [Canada and the U.S.] will take measures to ensure the prompt issuance of all necessary permits, licenses, certificates, rights-of-way, leases, and other authorizations required for the expeditious construction and commencement of operation of the pipeline..All charges for such permits, licenses, certificates, rights-of-way, leases, and other authorizations will be just and reasonable and applied to the pipeline in the same non-discriminatory manner as to any other similar pipeline. Both governments will take measures necessary to facilitate the expeditious and efficient construction of the pipeline consistent with the respective regulatory requirements of each country.

MR. PALMER summarized that the U.S. has the commitment of the government of Canada to prosecute the project expeditiously.

RECESSED: [1:53:30 PM](#)

RECONVENED: [1:54:58 PM](#)

REPRESENTATIVE KELLY described construction experiences and asked if time could be cut.

MR. KEOUGH stated that every delay would become a material cost factor. They did not look at the construction phase of the project. He acknowledged there would be challenges regarding the construction aspects. He said that TransCanada should have the advantage because of the right-of-way through the Yukon and because of existing infrastructure in Alberta. British Columbia also has advantages that could save time.

REPRESENTATIVE KELLY asked if there were advantages to the Denali project.

MR. KEOUGH said a third party proponent might have an advantage because of issues TransCanada could encounter. For example, regarding the process, TransCanada has the NPA and the Northern Pipeline Agency created under that legislation. That inherently should be an advantage; however, a number of parties have questioned whether the current proposal fits the framework of the NPA. The continued applicability of the NPA could be challenged regarding the duty to consult, the Yukon Board, and other things that are outside the scope of the NPA. The debate itself can cause delay. A new project proponent would not be exposed to that type of concern. They would have to go through a process from the beginning, but that might lend clarity. On the other hand, it could take time to draw the bodies together to establish a process.

[2:04:28 PM](#)

CHAIR SENATOR HUGGINS asked to be refreshed on challenges related to Enbridge, Inc.

MR. PALMER responded that he had experience with Enbridge. He had heard allegations that TransCanada's route is different, but it is not. He refuted charges that the volumes, size of the pipe, design, or capacity is different and that these differences have changed the fundamental terms of the agreement. He asserted that the language in the NPA is permissive regarding those items.

[2:06:39 PM](#)

SENATOR WAGONER referred to Slides 23-24 [Yukon Land Status] and asked how the orange areas related to the White River and Kaska First Nations areas.

MR. BERGNER responded that the orange areas correspond with two areas where there have not been modern land claims agreements. The one on the west side corresponds with White River, and the one on the east side corresponds with Kaska. The orange areas are not a transfer of ownership, but an interim land withdrawal that the government has made in anticipation of a settlement. There are currently no negotiations between the federal territorial government and the White River and Kaska areas.

SENATOR WAGONER asked if the lands could become owned by the First Nations at the conclusion of the claim.

MR. BERGNER said that was a fair characterization.

SENATOR WAGONER observed that the pipeline goes through the two areas but does not bisect areas where ownership could be transferred to the First Nations.

MR. BERGNER concurred; however, he pointed out that there are a number of areas where the pipeline runs adjacent to an area that has been withdrawn on an interim basis. The policy of the government in settling has been to exclude existing rights, including an existing right-of-way, from any land transfers. He added that the orange patches are drawn on the map by the government and not the First Nations, who have not agreed to the government's position.

SENATOR WAGONER referred to the center of Yukon on the map and the darker areas indicating land that has been settled. He described multiple layers of First Nation claims on the map and asked how that worked.

MR. BERGNER responded that dark gray areas are Category A lands, indicating simple ownership, with surface and subsurface rights. The lighter gray areas, which are more numerous, are Category B lands, where there are surface rights only. The area in the middle of the map does not distinguish which First Nation owns the land.

[2:12:40 PM](#)

CHAIR SENATOR HUGGINS voiced his concerns regarding the statement "the government's position." He asked if First Nations could expand the size of the areas.

MR. BERGNER responded that the White River and Kaska areas are currently in unsettled claims areas. There are two ways for a First Nation to establish its claim. One is through negotiations. The second is through litigation with the government, claiming aboriginal title to a broader area. A few bands in British Columbia have pursued that, but the process takes many years with numerous challenges. No one has succeeded in proving aboriginal title conclusively.

MR. KEOUGH interjected that land claims settlements have respected pre-existing rights.

CHAIR SENATOR HUGGINS expressed concerns about changing forms of agreements.

[2:15:52 PM](#)

MR. BERGNER pointed out that in the Yukon there is an umbrella final agreement. It sets out standard terms for a treaty. All of the treaties that have been reached in the Yukon have followed that model. There has been no indication that the model will be changed.

CHAIR SENATOR HUGGINS asked if there were points on the route that TransCanada thought Alaska should pay attention to.

MR. PALMER responded no. The umbrella final agreement was established in 1993 and sets out the framework for all final land claims. TransCanada's right-of-way through the Yukon is recognized in that umbrella final agreement and has been recognized by six of the eight First Nations that have final land claims settlements along the right-of-way. There are two remaining. The Kaska have not completed negotiations with the government of Canada. White River completed negotiations but have not held a ratification vote.

[2:18:35 PM](#)

SENATOR FRENCH referenced the issues of former liability with former partners. He asked if the right-of-way and certificate ever belonged to the ANNGTC.

MR. PALMER responded that a separate commercial entity, Foothills Pipeline Ltd., owns the Canadian assets. Foothills is a 100 percent subsidiary of TransCanada. It

holds the right-of-way in Canada and holds the certificate of public convenience and necessity. It has all the engineering information that would be used for the project. Foothills has nothing to do with the previous entity, ANNGTC, that was structured on the Alaskan side. If the license is granted, TransCanada will construct the Alaskan section of the project, and Foothills will construct the Canadian section. They will interconnect at the border.

[2:20:51 PM](#)

SENATOR FRENCH queried regarding the reasons the NPA may not provide TransCanada with the single window regulatory process and alternatives that could be used.

MR. KEOUGH focused on whether the debate that could occur would delay the project, regardless of the outcome. Bennett Jones looked at a number of the concerns and concluded there could be some delay on the project. He thought that TransCanada's application acknowledges that they will try to meet the new legislative requirements and standards. If they take a proactive approach of trying to ensure that they meet those requirements, even if they are doing it under the umbrella of the NPA, the concerns will be addressed.

[2:25:28 PM](#)

MR. PALMER added specifics from the Pipeline Treaty, Clause 3, regarding the pipeline design:

The initial capacity of the pipeline will be sufficient to meet, when required, the contractual requirements of U.S. shippers and of Canadian shippers. It is contemplated that this capacity will be 2.4 bcf/d of Alaskan gas and 1.2 bcf/d of northern Canadian gas.

MR. PALMER pointed out that the language is permissive, not restrictive. He did not argue with previous remarks that parties may wish to challenge. In regard to environmental issues, he referred to a new piece of legislation, the Canadian Environmental Assessment Act. However, the NEB Act was passed in 1959, twenty years before the NPA. He stated that they have used the NPA in meeting environmental conditions and will continue to do so.

[2:28:36 PM](#)

SENATOR ELTON referenced different kinds of negotiations project sponsors have used with First Nations, such as the soccer field. He assumed that the costs of infrastructure development would be included in a tariff. He asked if there was a standard that would be applied to limit costs.

MR. BERGNER responded that the agreements negotiated between project proponents and First Nations have been part of the cost of construction, part of the rate base for the project, recoverable through tolls. The regulator is the ultimate arbiter. The test of "reasonableness" has to be met. However, this is recent practice. The regulators don't have long experience with evaluating the reasonableness of agreements. They are well aware of the risk.

MR. KEOUGH added that the rate payer plays a role in determining reasonableness of costs.

[2:33:25 PM](#)

SENATOR ELTON acknowledged the complexity of the issue. He thought more inducement would lead to faster construction.

MR. KEOUGH agreed and added that trying to expedite by paying excessive amounts would be taking a risk that shareholders would not like. He did not think regulators would be sympathetic if they thought that proponents were "buying their way out" of properly addressing an issue.

[2:34:45 PM](#)

REPRESENTATIVE HAWKER addressed the Certificate of Public Convenience and Necessity held by Foothills. His understanding was that, like FERC, the NEB could impose conditions on the certificate.

MR. KEOUGH agreed.

REPRESENTATIVE HAWKER thought the certificate issued had conditions attached, including a requirement that the user deviate from the original pipeline design plan closer to Dawson to accommodate the Dempster Lateral.

[2:36:45 PM](#)

MR. KEOUGH explained that the route that was approved was different than the route included in the original application. The change was put in to accommodate a Dempster Lateral, two-form part of the project. One of the scenarios that could have evolved at the time this was being examined thirty years ago was that Mackenzie Valley gas would not take its own pipeline south to mainland Canada but would join into the Alaska pipeline project around Whitehorse. The name of that pipeline was the Dempster Lateral.

[2:38:08 PM](#)

MR. PALMER clarified that the original route of the project from Alaska continuing through Yukon was to go through Dawson City. The Dempster Lateral would have come down the Dempster Highway from the Northwest Territories to Dawson, a shorter route than the route Alaska wanted through Whitehorse. Mackenzie Valley gas is currently pursuing another route.

REPRESENTATIVE HAWKER understood that the certificate would have required Alaska gas to bear two-thirds of the cost of the construction of the Dempster Lateral.

MR. PALMER stated that Alaska was required to bear the cost of the extra length required to re-route the project.

REPRESENTATIVE HAWKER asked if certificate were still valid if the project were to re-emerge.

MR. PALMER answered that Foothills had an obligation to prepare an application for the Dempster Lateral, which it met. There was no obligation to construct the pipeline. Over the last decade, the Mackenzie project has been pursued directly down the valley. There has been no active work on the Dempster Lateral for decades.

[2:41:46 PM](#)

REPRESENTATIVE HAWKER reiterated his question.

MR. PALMER stated that Foothills has no obligation to construct the Dempster Lateral.

REPRESENTATIVE HAWKER asked if the condition in the NEB certificate would still be a condition on this project if it were to come up again.

MR. PALMER said that in the unlikely event that Foothills would construct the Dempster Lateral, the provision is still there.

REPRESENTATIVE HAWKER restated that it is still a condition on the certificate. He stressed the potential risk.

[2:43:46 PM](#)

MR. PALMER agreed that structures often change over time in terms of how commercial deals are put together, but stated he had seen no change in the intentions of the Mackenzie project over the past ten years. They had not approached TransCanada to construct the Dempster Lateral.

[2:44:38 PM](#)

REPRESENTATIVE GATTO wanted to address the likelihood of success. The Mackenzie project is having trouble. The project lead is Imperial Oil.

MR. PALMER agreed that the lead is Imperial Oil, which Exxon owns 70 percent of. The other principle players in the project are ConocoPhillips and Shell. The Aboriginal Pipeline Group has a small interest with potential to take a one-third interest, and TransCanada has a tiny interest.

REPRESENTATIVE GATTO stated his interest in TransCanada experiences with permitting in Canada. He understood TransCanada was active in the Keystone project. He asked for a description of TransCanada's experience with difficulties in permitting.

MR. PALMER responded that he had not worked specifically on the Keystone project or other TransCanada projects as he has been focused on the Alaska project for several years. Keystone is moving forward with construction in spite of challenges on state and federal levels in both Canada and the U.S.

[2:47:14 PM](#)

REPRESENTATIVE FAIRCLOUGH asked if Alaska North Slope gas traveling down the Alaska portion of the pipeline is owned by Alaska.

COMMISSIONER GALVIN answered that the gas is owned by the producers once it is in the pipeline.

REPRESENTATIVE FAIRCLOUGH asked who owned the gas when it crosses the Canadian border. She wanted to know where ownership changes hands.

COMMISSIONER GALVIN explained that the gas molecules are owned by the producers, put into a pipeline owned by an entity that is regulated by FERC on the Alaskan side. On the Canadian side the molecules are still owned by the same producers, in a pipeline owned by a separate but affiliated company regulated by the Canadian regulatory bodies.

REPRESENTATIVE FAIRCLOUGH asked if Canada was off-taking some gas into the Yukon and wondered how the value of the off-take is calculated.

[2:49:36 PM](#)

COMMISSIONER GALVIN said there were designated off-take points required under Canadian law. He thought the question was regarding the obligation to sell gas at those off-take points and what the implications are for Alaska's tax and royalty provisions.

REPRESENTATIVE FAIRCLOUGH asked if Commissioner Galvin was aware of off-take points in the Yukon.

COMMISSIONER GALVIN responded that he was aware.

REPRESENTATIVE FAIRCLOUGH stated that she had not gotten that information. She pointed out that TransCanada spoke about import and export law. Alaska has been talking about how to get Alaska gas to market. She understood that there would be off-take into Canada at the Alberta Hub. She discussed some of the volumes and wondered if the gas that went to the Yukon went first to the Hub.

[2:52:46 PM](#)

COMMISSIONER GALVIN explained that when the gas comes off the North Slope, it is owned by producer. The state could

choose to take possession of their share, but for the discussion he would assume the state allowed the producer to own the gas and sell it for the state. The producer then owns the gas as it enters the pipeline. The gas goes down the pipeline. There would most likely be Alaskan off-take points, but off-take is not required. The producer has to sell the gas to someone who wants to buy it at an off-take point. A local utility might buy the gas, for example.

COMMISSIONER GALVIN continued to explain that the same thing happens when the gas enters Canada. There is an additional point where the producer will contract to sell gas, but that is expected to be a small amount. Those sales contracts are not a significant portion of the economics of the project. There would also be minimal sales at the Alberta Hub. The ultimate consumers may be in Canada or in the U.S.

COMMISSIONER GALVIN pointed out that import/export balances are considered from a very macro level. Most of the gas going from the North Slope to the Alberta system is expected to end up back in the U.S.; the quantity exported at the Alaska border is likely to be imported somewhere along the Canadian/U.S. border. He emphasized that the molecules exported may not be the same molecules imported.

[2:56:12 PM](#)

COMMISSIONER GALVIN continued that the amount of gas sold in Canada at various junctures would be the result of a sale agreement between the producer and a buyer within the location, not determined by Alaska or the Canadian government.

MR. PALMER cited Clause 3b of the Treaty:

The shippers on the pipeline [through the Yukon] will upon demonstration that an amount of Canadian gas equal to the btu replacement value basis will be made available for contemporaneous export to the U.S., make available from Alaskan gas transmitted through the pipeline gas to meet the needs of remote users in the Yukon and in provinces through which the pipeline passes.

MR. PALMER emphasized that the volume taken off would be very small and must be replaced with Canadian gas. He

listed the towns contemplated in the Yukon: Beaver Creek, Burwash Landing, Destruction Bay, Haines Junction, Whitehorse, Teslin, Upper Liard, and Watson Lake. The population of Yukon is 33,000 people, so expected volume at those locations is tiny. The volumes are only required if there is replacement Canadian gas for export to the U.S.

MR. PALMER clarified his response to REPRESENTATIVE HAWKER. Both zones 10 and 11, the Dempster Lateral, were never certificated by NEB. Zones one through nine, everything but the Dempster Lateral, have been certificated.

[3:00:04 PM](#)

REPRESENTATIVE FAIRCLOUGH asked a question regarding off-takes before the Alberta Hub.

CHAIR SENATOR HUGGINS said that he had heard about those off-takes previously.

REPRESENTATIVE FAIRCLOUGH stated concerns that Alaska use of the gas was restricted. She asked if there were similar provisions in Alaska. She wondered if there was a reason the off-takes have not been highlighted.

COMMISSIONER GALVIN thought there was a misunderstanding because of unrelated issues colliding. He stated that there is no restriction whatsoever on Alaskan off-take once the pipeline is built. Comparing question of off-takes on the Canadian side does not relate to the issue of the 500 Mmcf/d for other projects. That restriction relates to when the project moves towards commencement. Alaska has made a commitment to our licensee but wants also to protect in-state needs through an alternate pipeline. When the pipeline is actually in place serving Canadian locales upstream of Alberta, Alaska will have full ability to take gas as needed at the going rate.

REPRESENTATIVE FAIRCLOUGH thought the gas belongs to Alaska until it crosses the border. She wanted clarification regarding trade imbalance and deficit, and where the shippers would sell gas. She asked how the gas is accounted for at the off-take points.

[3:03:54 PM](#)

MR. PALMER explained that once the gas enters the pipe, the shippers own it, not the pipeline company or the state, unless royalties have been taken in-kind. The shippers have possession of the gas until they make a sale. They can sell it either because they want to or because they are required to by the treaty. If they make a sale at Whitehorse, the volume would be small, perhaps 10 to 20 Mmcf/d. In the event there is no replacement of that volume, then the shipper will have made a sale, or exported their gas from the U.S. into Canada. In the event that the volume is replaced with Canadian gas further downstream, the net effect would be zero. In the event they sell the gas in Alberta, the effective location for the incremental volumes will ultimately be the U.S. This is common. Most of the gas in the Alberta Hub is traded four or five times each day. The ultimate ownership of the gas might be different leaving the hub than entering it. Ultimately, however, it will re-enter the U.S. and the value will not shift. Where it will be consumed cannot yet be specifically identified.

REPRESENTATIVE FAIRCLOUGH asked for assurance that the cost of the take-offs would not be borne by the pipeline.

MR. PALMER answered that the costs of the off-takes are limited at a total of \$5 million, as laid out in the treaty. This was a benefit Canada received in the negotiations.

CHAIR SENATOR HUGGINS explained that the panel would broaden after the break.

[3:08:32 PM](#)

COMMISSIONER GALVIN described the mechanics of off-take points at Whitehorse and other places. There will be meters with an accounting mechanism for ownership. Once the gas goes into the line, the molecules are mixed. An entity owns a volume of the total gas in the pipe. He stated that Alaska would bear the cost of the off-takes to some extent but the price that would be paid in Whitehorse would bear part of the cost. One of the things that will be established in AGIA is a methodology for computing price.

COMMISSIONER GALVIN addressed the issue raised by REPRESENTATIVE FAIRCLOUGH about not receiving information. He said the analysis is made up of a tremendous amount of information. The presentations try to present the most

important and relevant for legislative consideration. He acknowledged that every issue is not covered.

RECESSED: [3:11:59 PM](#)

RECONVENED: [3:12:15 PM](#)

CHAIR SENATOR HUGGINS acknowledged the new members of the panel, including Donald Bullock, Steve Porter, Bonnie Harris, Dan Dickinson, CPA, Legislative Budget and Audit Committee and Tamara Cook, Director, Division of Legal and Research Services, Legislative Affairs Agency were available for questions but did not speak.

[3:15:28 PM](#)

REPRESENTATIVE GRUENBERG referred to a provision from the act to establish the Northern Pipeline Agency, Section 3b. He read the "transit agreement":

Such replacement gas will be treated as hydrocarbons in transit for purposes of the agreement between the government of Canada and the government of the United States of America concerning transit pipelines.

REPRESENTATIVE GRUENBERG continued with Article 2.1:

No public authority in the territory of either party [Canada and the United States] shall institute any measures other than those provided for in Article V. which are intended to or which would have the effect of impeding, diverting, redirecting, or interfering with in any way the transmission of hydrocarbons in transit.

REPRESENTATIVE GRUENBERG asked if the language in Article 2.1 referred to the language in the previous paragraph.

MR. PALMER thought it did, in his opinion.

REPRESENTATIVE GRUENBERG continued that the intent of this is minus any of the small amounts going to small towns, along with some loss. He wondered if the intent of the two documents was that basically the hydrocarbons, not molecule by molecule but by quantity, are going from the U.S. to the U.S. through Canada.

MR. PALMER answered yes.

REPRESENTATIVE GRUENBERG asked if dealings with First Nations are governed by Canadian federal law, or if the courts and legislative assembly of the Yukon Territory, for example, have a role. He pointed out that in Alaska there have been legislative exchanges with the members of the Yukon legislative assembly. He wondered if the two bodies could deal with First Nations issues together.

MR. BERGNER answered that dealings with First Nations apply to all levels of Canadian government: federal, provincial, and territorial. The legal duty is enforceable through the courts on all three levels. In terms of the government's role, there are a number of Canadian jurisdictions, mostly provincial, that have implemented consultation policies or guidelines. This is an attempt by provincial governments (Alberta and British Columbia are examples) to put a policy framework to government decision making, to identify how consultation will take place, and how this legal duty of the government will be discharged. The government of the Yukon does not have such a policy. Yukon's government is in a different position, given the large number of settled claims in the territory. There is on-going litigation in those courts regarding the extent of the application of the duty to consent. He suspected the unresolved nature of that question has probably restrained Yukon's enthusiasm for creating a consultation policy akin to Alberta and British Columbia.

[3:20:51 PM](#)

REPRESENTATIVE GRUENBERG asked if the government of Alaska, particularly the legislature, should take any role in the matter in relation to the Yukon government.

MR. BERGNER hesitated at the words "take a role." No legal duty applies or binds the Alaska government or the federal government. He described his role as being aware of the issue and said that any project that proposes to use land in Canada will face this risk. Like many other risks beyond the jurisdiction of the state of Alaska, it's one to monitor, but he did not see an active role the state could take.

[3:22:44 PM](#)

REPRESENTATIVE ROSES referred a statement regarding the advantage of having the Northern Pipeline Agency, established by the Northern Pipeline Act, instead of three different entities trying to set regulation. He asked if that would apply to any pipeline that would go through Canada from Alaska.

[3:23:32 PM](#)

MR. KEOUGH responded that the Northern Pipeline Agency was created under the Northern Pipeline Act, which applies only to the specific project that was contemplated at the time it was passed. Any new third party proponent would have to start afresh with a process before the NEB, the Canadian Environmental Assessment Agency, and probably the Yukon Environmental and Socio-economic Assessment Board. They would not have the benefit of either the Northern Pipeline Act or the Northern Pipeline Agency.

REPRESENTATIVE ROSES asked if a proponent could attempt to establish a similar single, coordinated process. He wondered if that was why there are two companies, TransCanada and Foothills.

[3:24:52 PM](#)

MR. PALMER stated that there has always been a separation in ownership in the entities that would develop the Alaskan section and the Canadian section. Foothills has access to the Northern Pipeline Act and is the main party in the Act and in the treaty. It is the sole entity that has access to a single window regulatory agency for the project.

REPRESENTATIVE ROSES wanted to know if that would apply to partners that could join with Foothills.

MR. PALMER replied that any party that is an owner in Foothills would have access to it.

REPRESENTATIVE ROSES asked if the Certificate of Public Convenience and Necessity was a conditional or unconditional certificate in Canada.

[3:26:26 PM](#)

MR. PALMER replied that the certificate is approved and has terms and conditions that will have to be met by

TransCanada and Foothills. In each of the locations the project goes through there are specific terms and conditions it must meet. There will have to be approval for the final design of the project from the designated officer, which is a generally an NEB member appointed under the Northern Pipeline Act. All of that has been contemplated for thirty years with five expansions through 1998.

REPRESENTATIVE ROSES wanted clarification about the five off-take points in Canada, and about tariffs. The off-take points are part of the application. He understood that as long as the off-take volume was replaced, it was not an import/export issue. The tariffs would be calculated at each of the off-take points. He asked if there are still transportation costs if .2 Bcf/d were taken off before it got to Alberta, and then .2 Bcf/d put back somewhere else.

[3:28:40 PM](#)

MR. PALMER explained that customers only pay for the zone through which their gas is transported. He said the more appropriate number is .02 Bcf/d, but if that number is used, the Canadian section of the project will have zonal rates specifically set out in the Act. There are two zones within the Yukon, for example, and so on down the project. Therefore, if .02 Bcf/d were delivered upstream of Whitehorse, there would be .02 Bcf/d left downstream of Whitehorse.

REPRESENTATIVE ROSES asked if there is a clause in the pipeline act that requires partnering with any line that comes across the border at that point.

MR. PALMER replied that there is not a requirement in the act. The NEB has the power under Section 71.3 to require Foothills or any other Canadian pipeline to interconnect with another party under certain circumstances.

REPRESENTATIVE ROSES asked if another U.S. company could then apply through NEB and the Canadian company would have to cooperate with them.

MR. PALMER replied that Canada, through the NEB, has the right to require Foothills to interconnect at the border. He noted that he spoke as a businessman and not a legal person.

[3:31:39 PM](#)

MR. KEOUGH reported that Mr. Palmer had captured the essence of the operation of the National Energy Board Act.

REPRESENTATIVE ROSES restated his question at the request of the chair.

[3:33:16 PM](#)

COMMISSIONER GALVIN responded that one question is: if Foothills builds a pipeline to the border on the Canadian side and Denali builds a pipeline to the border on the Alaskan side, would Foothills be required to hook into it. The question of whether NEB would require Foothills to build a pipeline under the NPA if Denali came to the border was a very different question. Foothills has no obligation if Denali builds a pipe to the border and wants to be hooked up to the Alberta system. If Foothills builds the pipe to the border, and Denali builds one from the other side to the same point, his understanding of Mr. Palmer's statement is that NEB would not require Denali to build a separate line around the Foothills project in order to get to Alberta; they would probably require Foothills to hook in at that point. He did not think that scenario would play out.

REPRESENTATIVE ROSES pointed out that the discussion highlighted the fact that at some point there would be a partnership. The issue is who gets to the partnership the fastest.

CHAIR SENATOR HUGGINS thought the question deserved an answer.

COMMISSIONER GALVIN replied that Foothills will only build from the Canadian border to the Alberta Hub if there is an agreement to ship gas along the pipeline.

MR. PALMER agreed with Commissioner Galvin and added that Foothills would seek customers and would not construct the pipeline without customers in hand.

[3:36:23 PM](#)

CHAIR SENATOR HUGGINS addressed a previous question related to routing. He read from the report: "There will be an onerous process potentially leading materially to the time needed to secure all appropriate...into British Columbia." He asked for comment.

MR. KEOUGH responded that Foothills has a right-of-way through the Yukon but not through British Columbia. That type of process can take a material amount of time to complete. He emphasized a significant distinction between the Yukon and British Columbia. They did not want people to misunderstand the difference between the two jurisdictions.

MR. PALMER agreed and elaborated that circumstances are different in Yukon because there is very little pipeline there, unlike British Columbia and Alberta. There are few private land interests in Yukon Territory. It is largely provincial Crown land and the pipeline does not cross First Nations reserves. TransCanada is confident about attaining rights-of-way and access for facilities through Alberta.

[3:39:09 PM](#)

CHAIR SENATOR HUGGINS wanted clarification about the term "onerous."

MR. KEOUGH replied that that the word was used to ensure clarity regarding the distinction between Yukon, where there is a current right-of-way, and British Columbia, where the process will be onerous in comparison. He pointed out that any party would face that difficulty.

MR. PALMER added that a memorandum of agreement was signed between the Northern Pipeline Agency, the government of British Columbia, and the government of Alberta separately to provide Crown land to Foothills for use by way of easement grant lease or other authorizations on terms consistent with its general practice for use for a project. This highlights the fact that the governments of Canada and of the provinces of British Columbia, Alberta, and Saskatchewan have already contemplated this. Those processes were used in those provinces for the construction of the pre-build.

[3:41:17 PM](#)

SENATOR FRENCH wanted to address Alaskan fears about authorizing a foreign company to take gas through a foreign country. He asked about the history of relationships between the two countries and why Alaskans shouldn't fear a thirty year process.

[3:42:50 PM](#)

MR. PALMER responded that the natural gas and oil businesses in North America are completely integrated, whether they are integrated in Canada or the United States. TransCanada has been transporting Canadian gas into the U.S. for more than forty years. There have been export and import permits and successful certification on both sides. This has been true not just for TransCanada but for all the oil and gas businesses. This has worked well for both sides as the U.S. has a market that is larger than their supply, and Canada has a supply larger than their market. We share the largest and longest undefended border between two nations in the world. Canada is the U.S.'s largest trading partner. Regarding the Alaska pipeline project, there is a unique and specific treaty and piece of legislation in place in Canada to expedite the transport of Alaskan gas across Canada and back into the U.S.

[3:46:46 PM](#)

MR. KEOUGH added that history demonstrates the stability and reliability of the relationship between the two countries, especially as it relates to energy commodities. He observed that the pipelines supplying those commodities have been in operation for an extended period of time and have worked because of free market forces. The track record demonstrates the stability.

[3:48:54 PM](#)

MR. BERGNER agreed and emphasized the good relationship along the long border. He said the vast majority of Canadians live within 100 kilometers of the border, which translates to Canadians thinking about the relationship. Business relationships across the border are increasing. He referred to the North American Free Trade Agreement (NAFTA) and the free trade agreement before NAFTA, which have prompted many industries to look beyond the border and to operate simultaneously on both sides, particularly related to oil and gas.

COMMISSIONER GALVIN observed that Alaska has tremendous supplies of natural gas and a limited market and so must seek other markets. Because of geography, that gas must either leave Alaska to be consumed in a foreign country or transport through Canada to the continental U.S.

[3:51:48 PM](#)

CHAIR SENATOR HUGGINS added that the most integrated military operation capability in North America is the North American Air Defense Command. He related a personal story about a relationship with a Canadian in the military.

SENATOR FRENCH emphasized that tens of thousands of jobs will be created, including white and blue collar jobs. The treaty addresses the free flow of resources between the countries. He asked about laws that allow Alaskan engineers to work in Canada through reciprocity agreements.

[3:53:19 PM](#)

MR. PALMER spoke to his understanding of the requirements regarding engineers. Only an ethics exam is required for a qualified U.S. engineer to work in Alberta; it is common for U.S. citizens to work there. The Association of Professional Engineers, Geologists and Geophysicists of Alberta (APEGGA) adjudicates who is qualified to work in Alberta. He said APEGGA would file a letter on the subject. British Columbia has similar rules.

[3:54:48 PM](#)

MR. KEOUGH added that one of the greatest challenges facing the construction of new infrastructure in Western Canada currently is the shortage of resources. It is necessary to bring in skilled workers to assist in the completion of projects. There would be too much demand and too little supply for all resources.

[3:56:41 PM](#)

CHAIR SENATOR HUGGINS referred to an unanswered question regarding reciprocity between Canada and some of the provinces when it comes to qualifications of engineers.

[3:57:18 PM](#)

SENATOR WIELECHOWSKI wanted clarity regarding legal issues. He asked what happens if the legislature amends AGIA.

DONALD BULLOCK, ATTORNEY, LEGISLATIVE LEGAL SERVICES, observed that one of the steps consisted of certification by the commissioners that the application was complete. If requirements are changed, then the application would not be complete, and the process would have to start over. This is even before the due process issues are addressed. He pointed out that not only TransCanada would be affected by a decision to change the application. Other companies decided to apply or not based on certain requirements, and changed circumstances might have affected those decisions. Amending AGIA could effectively void an application.

STEVE PORTER, LEGISLATIVE CONSULTANT, LEGISLATIVE BUDGET AND AUDIT COMMITTEE, LEGISLATIVE AFFAIRS AGENCY, asked if the question related to the effective date clause.

SENATOR WIELECHOWSKI said his follow-up question was what would happen if that date were changed.

MR. BULLOCK replied that it does affect some practical things with TransCanada.

SENATOR WIELECHOWSKI asked what would happen if TransCanada were approved but the license was not effective until January 1.

MR. BULLOCK stressed that under the existing legislation, there is an expectation by those that applied under the law that they would know whether or not they were going to go forward within a certain period of time [sixty day requirement, AS 43.90.190]. It could significantly change the benefits to their agreement or their anticipation of what they were going to do, to the extent that requirements or resources have been tied up during that extended period. He reiterated that [a change to the application] could raise due process and statutory issues regarding when the legislature must approve what the commissioners have offered.

[4:00:48 PM](#)

BONNIE HARRIS, SENIOR ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF LAW, OIL, GAS AND MINING SECTION, replied

that the Act contemplated that the decision would be made within sixty days, so the applicants would know within that time.

CHAIR SENATOR HUGGINS thought that appeared to contradict previous testimony that it would be the effective date put on passage of the bill.

MS. HARRIS replied that the legislation would be effective immediately. If it were passed within the sixty days, then it would be consistent with the view of the legislation. If the effective date of the bill were later, it raises the concerns that Mr. Bullock alluded to. Also, under the application that TransCanada has committed to, the application would remain valid for nine months from the date the application was due, which was November 30. Also built in is a time at which the decision would shift to TransCanada whether they would want to go on with this if the authorization to issue a license were delayed beyond that date.

[4:02:55 PM](#)

MR. BULLOCK responded that section AS 43.90.190 contemplates and anticipates when the bill would take effect. The statute does not require and reference the effective date of the legislation. The intent was to avoid the issue of an insufficient vote to make the bill effective immediately, so the requirements in 43.90.190b are if a bill approving the issuance of the license passes the legislature within sixty days after the legislature receives it. It doesn't say if an act takes effect within sixty days after. So it is the legislative action of passing the bill through both houses that satisfies the sixty day requirement. When it becomes law, then the commissioners are authorized to issue the license and proceed.

SENATOR WIELECHOWSKI asked about whether a letter of intent could be added to AGIA or to the application and also if a memorandum of understanding could be added to clear up the ambiguities.

MR. BULLOCK responded that a letter of intent may help interpret the law. It's an uncodified section directed at the courts that states the legislative intent that the

courts give expedited consideration with anything related to the project. It is not binding on the courts.

SENATOR WIELECHOWSKI asked about a memorandum of understanding.

MR. BULLOCK thought that where there are ambiguities within AGIA and the requirements put forth in the RFA, there is room for TransCanada and the administration to clarify and make agreements. It could not change the fundamental terms in AGIA that were presented in the RFA and contained within the act. They could not agree otherwise.

[4:05:59 PM](#)

SENATOR WIELECHOWSKI asked if the memorandum of understanding could be between the legislature and TransCanada.

MR. BULLOCK explained that the executive branch under the separation of powers will issue the contract and continue to negotiate the agreement.

SENATOR WIELECHOWSKI asked if the governor could award the license to TransCanada if the legislature rejects them, since there is a separation of powers.

MR. BULLOCK replied that there is that possibility. Normally the executive branch is the one that signs contracts that generally affect the state. The legislature has contracts too, for office space for example. The executive branch acts and carries out the policies that the legislature has established by law. When the governor presented AGIA, she said she would give the proposed license to the legislature. The original bill was that the legislature had red light power; they could stop it by taking action. If they took no action, it would go forward. As the legislation progressed, it was amended to include approval within sixty days. There are different interpretations of that power. One interpretation is that the governor or executive does not have full power to sign that contract until the legislature actually approves it. Another interpretation is that the governor could possibly issue the license if she finds that the application satisfies all the things that the legislature anticipated and hoped for when they passed AGIA, including the twenty "must haves" in 43.91.30, as well as the authority for the

commissioners to add additional requirements in the applications. He referred to a case in which the legislature approved sub-cabinet officials. Historically, the governors had put forth that list for legislative approval. At some point, they stopped doing that. It was litigated and the court strictly construed the legislative approval requirements and said that, although the governor could voluntarily do it, the governor did not have to and the legislature did not have the authority or the power to approve positions that were not authorized for approval under the constitution.

[4:09:13 PM](#)

REPRESENTATIVE RAMRAS questioned if TransCanada personnel will live in the U.S.

MR. PALMER responded that TransCanada will not make those decisions until the license is granted.

[4:10:24 PM](#)

REPRESENTATIVE RAMRAS thought Alaska hire was a key indicator.

MR. PALMER answered it would be if TransCanada is granted the license.

REPRESENTATIVE RAMRAS asked if key TransCanada upper management personnel would live in Alaska if the license was granted.

MR. PALMER reiterated that those decisions have not been made and that the company will make those decisions when granted a license. He acknowledged a clear obligation regarding Alaska hire.

REPRESENTATIVE RAMRAS asked about moving gas from the Cook Inlet field north to Fairbanks. He referred to a letter he had written to Kurt Gibson, who was the deputy director of the oil and gas division, regarding a commercial gas sale from the North Slope. He said Mr. Gibson told him that that sale would disturb the state's litigation posture on Spencer Hosie's "duty to produce" theory.

REPRESENTATIVE RAMRAS said he was in favor of an in-state line. He queried building a 450 or 500 Mmcf/d line from the

North Slope. He also asked for clarification regarding the "duty to produce."

[4:12:32 PM](#)

MR. PORTER responded that regarding Spencer Hosie's proposal, there is duty to produce on behalf of the owners of North Slope gas if it is economic to do so. The key question one of the legislators asked in May was whether the producers moving forward with the project satisfied the duty to produce. Mr. Hosie answered that in the affirmative in May. The same question was asked in Juneau later, and once again Mr. Hosie said yes. During the road tour, in Anchorage, the question was asked a third time; Mr. Hosie was not there and Commissioner Galvin answered the question by saying that as long as the producers are moving their own project forward, they have met the duty to produce. There is nothing the state can do to take that gas away from them as long as they are being reasonably prudent. If they stop that project, the question could be asked if a reasonably prudent operator would have continued to move the project forward.

[4:15:37 PM](#)

COMMISSIONER GALVIN listed three mischaracterizations in the exchange. He said the exchange in the letter mischaracterized Mr. Gibson's position on the relationship between the sale of gas and the duty to develop. Secondly, regarding Mr. Porter's comments regarding Mr. Hosie, he said the issue was brought up when Mr. Hosie could not defend himself. The question becomes one of credibility. He said he favored Mr. Hosie on the issue. Lastly, he refuted saying that the producers have met their duty by advancing the project. He said the producers have met their obligation if they moved their project ahead, produced the gas, and delivered it to market. Simply moving the project ahead did not meet the duty to develop.

COMMISSIONER GALVIN maintained that he had said throughout that the purpose of the Denali project is not yet played out. On the one hand, it could prove to be the vehicle by which gas gets to market. There is nothing within AGIA and within the state's leases that will preclude the producers from advancing their own project to build a pipeline bringing their gas to market. The question remains whether that will be the ultimate outcome. He thought advancing the

TransCanada project will drive the producers to pursue the Denali project. The state needs to keep its options open. He asked that people be accurate about what has been said on the record.

[4:19:20 PM](#)

REPRESENTATIVE RAMRAS apologized and clarified that he had had a spontaneous meeting with Kurt Gibson on the second floor inquiring why Mr. Gibson was not going to attend the Senate resource hearing about in-state gas. He stood by his characterization regarding the letter he wrote. He stated his intention to talk about in-state gas and build an in-state bullet line. He questioned why Alaska is not tapping into the North Slope where there is an enormous amount of natural gas; he wondered if part of the reason was related to the duty to produce.

[4:20:40 PM](#)

MR. PORTER commented that he had mentioned only facts that he can substantiate. He agreed with Commissioner Galvin that if Denali was only moving forward with the pipeline, they had not met their duty to produce. He said that the present circumstance is different than that. Once Denali started spending money toward moving a project forward, they began moving towards that process and began to meet the duty to produce. He stated that he had continually asked for the opportunity to be on the stand with Spencer Hosie to ask the question. He took issue with his credibility being called into question.

CHAIR SENATOR HUGGINS called a break to clear up questions of credibility.

RECESSED: [4:22:51 PM](#)

RECONVENED: [4:23:50 PM](#)

COMMISSIONER GALVIN offered a description of the perceived conflict. He thought the point was important and addressed a number of the issues in the relationship between the TransCanada project and the Denali project. He described a possible scenario in which the license is issued and TransCanada moves forward to open season. The Denali project also moves forward to their open season. TransCanada's open season happens first. Producers don't show up. What happens next is that TransCanada is required,

under the terms of AGIA, to move towards a FERC certificate. The project remains viable and available for gas to be committed to it. In the meantime, the producers have advanced Denali. The nature of the question becomes whether the investment of \$40 million this summer is a satisfaction of the duty to develop.

COMMISSIONER GALVIN stated that the question of duty to develop also applies as we move towards Denali's open season and the question of whether the producers are going to be able to get gas commitments at that open season. Having the TransCanada project continuing to move forward keeps the duty to develop issue up front and protects Alaska's interests.

[4:29:10 PM](#)

MR. PORTER agreed and emphasized the importance of the producers seriously moving their project forward. He said nothing other than incentives for the TransCanada project will force the producers to show up for the project.

[4:30:05 PM](#)

SENATOR THERRIault queried which panel members were licensed to practice law either in Alaska or another jurisdiction.

(COMMISSIONER GALVIN, MR. PORTER, MR. KEOUGH, and MR. BERGNER raised their hands.)

[4:31:27 PM](#)

REPRESENTATIVE DAHLSTROM asked about homeland security issues.

[4:32:41 PM](#)

MR. PALMER responded that he did not know the answer to that.

COMMISSIONER GALVIN said that homeland security had not been engaged within the state system. The federal Department of Homeland Security (DHS) is coordinated with the federal pipeline authority. They looked at AGIA but did not raise issues with regard to homeland security related

to the TransCanada project. He stated his confidence in the systems in place.

[4:34:11 PM](#)

SENATOR DYSON stated that Canadian and U.S. military cooperation goes back a long time. Together the countries have an organization called the North American Aerospace Defense Command (NORAD). They have provided top cover for North America since the early 1950s, and have expanded to include the maritime and terrestrial environment. Coordination is advanced and intricate, and working well. The Royal Canadian Mounted Police is the equivalent of the FBI and is well integrated.

[4:35:48 PM](#)

REPRESENTATIVE GARA queried for the record the evolution of TransCanada's discussions with other parties regarding building a pipeline to Valdez, and TransCanada's position regarding that pipeline.

MR. PALMER said there had been no evolution. If TransCanada holds the initial open season, and customers nominate Valdez, and there is sufficient volume to make it economic, TransCanada will construct the pipeline from Prudhoe Bay to Valdez.

REPRESENTATIVE GARA listed possible scenarios regarding volumes for the initial open season. He asked if TransCanada would be willing to construct the pipeline to Valdez if 2 Bcf/d were committed for that line, assuming the gasline permitting process through Canada for a 4 Bcf/d line goes more slowly than optimal.

[4:38:30 PM](#)

MR. PALMER stated that based on the evidence of the past forty days, most parties do not believe there will be that 6 Bcf/d nominated in an initial opening season. If 2 Bcf/d were nominated to Valdez and the Canadian project is not ready to proceed for whatever reason, TransCanada has indicated they are prepared to go forward based on customer contracts in place at that time.

[4:39:28 PM](#)

MR. PORTER emphasized the significance of the open season. TransCanada has committed to encourage either an LNG project or to Canada. The open season will indicate where people want to move the gas. As long as the open season is available to them, they need only to find a customer downstream willing to pay the producers. It is a commercial deal. In the scenario REPRESENTATIVE GARA referred to, if 2 Bcf/d were committed and if the Canadian portion was not moving forward, one of the other options is to hold another open season. Those processes signal and help the pipeline companies figure out what to do. If someone wants to move gas through LNG, they need to find customers and encourage them to get a contract with the producers.

CHAIR SENATOR HUGGINS stated his discomfort with the contract consisting of three documents and asked for legal clarification.

[4:41:48 PM](#)

MS. HARRIS replied that it is common in public contract law for the government to request bids or applications, which is considered the offer for the contract. In this case, the state got five offers; one was forwarded one to the legislature for review. Acceptance of the offer by the state creates the contract. The documents that make up the contract are AGIA, the RFA, which expands AGIA, and the application itself. If the license is issued, those documents will make up the contract. The implementation of the contract will come through the project plan that is in the application. For interpretation of what is required under the contract, they will look at the application, the RFA, and AGIA. If there were a question, AGIA would control it. There are different levels of terms. As long as the contract contains an offer, an acceptance, and discernable terms, there is a contract that can be implemented and enforced.

[4:44:24 PM](#)

MR. PORTER asked for clarification of the question.

CHAIR SENATOR HUGGINS explained that the license is a two-page document. He thought the three elements constitute the contract.

MS. HARRIS clarified that the two-page document certifies that a license has been issued, but when the license is issued, the contract is made of those [three] elements.

[4:45:13 PM](#)

MR. PORTER described a potential ambiguity in the document presented to the legislature. The administration is comfortable with it but willing to discuss the clarification. It is not a change in intent, but cleans up the language. He gave an example: if Party A is obligated to obligation 1, and Party B is obligated to obligations 1, 2, and 3, but the language of the license says Parties A and B are obligated to 1, 2, and 3, then it looks like Party A is also obligated to 2 and 3. This is an ambiguity in structure he would like the judiciary committee to look at, so that the state is only obligated to the AGIA requirements, not to the RFA or TransCanada's application. TransCanada, on the other hand, is obligated to all three. He wanted the language clarified.

MS. HARRIS understood the need for clarity in a contract document. She stated a contract needed terms that are set out, the rules that performance will be conducted under. She thought the contract does that. She did not think any court would mistake the state's three commitments under AGIA for the 20 plus commitments TransCanada has made. She is confident there is clarity in the contract and that she could defend it in court.

CHAIR SENATOR HUGGINS was concerned about being in court in Calgary.

[4:47:48 PM](#)

MS. HARRIS answered that the jurisdiction would be in Alaska.

COMMISSIONER GALVIN stated that the question of ambiguity has been cleared up in testimony that has been provided. Both TransCanada and the state have stated clearly that neither sees the state as being obligated to defend and comply with terms of TransCanada's application. That testimony would eliminate possible perceived ambiguity.

MR. PORTER suggested changing the language to clear up the ambiguity.

[4:49:25 PM](#)

REPRESENTATIVE GRUENBERG asked if Mr. Porter wanted to have a chance to go to Judiciary Committee.

MR. PORTER did not think the change had to slow the project down. He wanted an accurate depiction of what has been stated in testimony. He did not want to slow the process.

REPRESENTATIVE GRUENBERG asked if Mr. Porter wanted something else to be put on the record or into another document.

MR. PORTER referred to the last attachment on the findings, a document legislature is going to review and pass. He would amend that document slightly to match the intent.

REPRESENTATIVE GRUENBERG asked how that would be accomplished. He wanted language to do that.

CHAIR SENATOR HUGGINS asked the Judiciary chairs to meet with Mr. Porter and address his concerns.

MR. KEOUGH stated that he was staff counsel to the National Energy Board for three and a half years.

CHAIR SENATOR HUGGINS said the hearing the next day would be about NEB and FERC. He invited Mr. Keough.

[HB 3001 and SB 3001 were heard and held.]

[4:51:57 PM](#)

#### ADJOURNMENT

The meeting was adjourned at 5:35 PM (actual historical time).