ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
April 18, 2007
2:03 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Charlie Huggins, Vice Chair
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Gene Therriault

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 104
"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: SB 104
SHORT TITLE: NATURAL GAS PIPELINE PROJECT
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

03/05/07	(S)	READ THE FIRST TIME - REFERRALS
03/05/07	(S)	RES, JUD, FIN
03/14/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/14/07	(S)	Heard & Held
03/14/07	(S)	MINUTE(RES)
03/16/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/16/07	(S)	Heard & Held
03/16/07	(S)	MINUTE(RES)
03/19/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/19/07	(S)	Heard & Held
03/19/07	(S)	MINUTE(RES)
03/21/07	(S)	RES AT 3:30 PM SENATE FINANCE 532
03/21/07	(S)	Heard & Held
03/21/07	(S)	MINUTE(RES)

03/21/07	(S)	RES AT 5:30 PM SENATE FINANCE 532
03/21/07	(S)	Heard & Held
03/21/07	(S)	MINUTE(RES)
03/22/07	(S)	RES AT 4:15 PM FAHRENKAMP 203
03/22/07	(S)	Heard & Held
03/22/07	(S)	MINUTE(RES)
03/23/07	(S)	RES AT 1:30 PM BUTROVICH 205
03/23/07	(S)	Heard & Held
03/23/07	(S)	MINUTE(RES)
03/24/07	(S)	RES AT 1:00 PM SENATE FINANCE 532
03/24/07	(S)	Heard & Held
03/24/07	(S)	MINUTE(RES)
03/24/07	(S)	RES AT 3:00 PM SENATE FINANCE 532
03/24/07	(S)	Heard & Held
03/24/07	(S)	MINUTE(RES)
03/26/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/26/07	(S)	Heard & Held
03/26/07	(S)	MINUTE(RES)
03/27/07	(S)	RES AT 3:00 PM BUTROVICH 205
03/27/07	(S)	Heard & Held
03/27/07	(S)	MINUTE(RES)
03/28/07	(S)	RES AT 3:30 PM BUTROVICH 205
03/28/07	(S)	Heard & Held
03/28/07	(S)	MINUTE(RES)
03/29/07	(S)	RES AT 5:00 PM BUTROVICH 205
03/29/07	(S)	Heard & Held
03/29/07	(S)	MINUTE(RES)
03/30/07	(S)	RES AT 1:30 PM BUTROVICH 205
03/30/07	(S)	Heard & Held
03/30/07	(S)	MINUTE(RES)
03/31/07	(S)	RES AT 12:00 AM BUTROVICH 205
03/31/07	(S)	Heard & Held
03/31/07	(S)	MINUTE(RES)
04/01/07	(S)	RES AT 11:00 AM BUTROVICH 205
04/01/07	(S)	Moved CSSB 104(RES) Out of Committee
04/01/07	(S)	MINUTE(RES)
04/02/07	(S)	RES RPT CS 6AM SAME TITLE
04/02/07	(S)	AM: HUGGINS, GREEN, STEVENS, STEDMAN, WIELECHOWSKI, WAGONER
04/02/07	(S)	RES AT 3:30 PM BUTROVICH 205
04/02/07	(S)	Moved Out of Committee 4/1/07
04/02/07	(S)	MINUTE(RES)
04/04/07	(S)	JUD AT 2:45 PM BELTZ 211
04/04/07	(S)	Heard & Held
04/04/07	(S)	MINUTE(JUD)
04/11/07	(S)	JUD AT 1:30 PM BUTROVICH 205
04/11/07	(S)	Heard & Held

04/11/07	(S)	MINUTE(JUD)
04/11/07	(S)	JUD AT 5:30 PM BUTROVICH 205
04/11/07	(S)	Heard & Held
04/11/07	(S)	MINUTE(JUD)
04/12/07	(S)	JUD AT 3:30 PM BUTROVICH 205
04/12/07	(S)	Public Testimony 5:30 pm to 7:00 pm
04/13/07	(S)	JUD AT 1:30 PM BUTROVICH 205
04/13/07	(S)	Heard & Held
04/13/07	(S)	MINUTE(JUD)
04/13/07	(S)	JUD AT 5:30 PM BUTROVICH 205
04/13/07	(S)	Heard & Held
04/13/07	(S)	MINUTE(JUD)
04/14/07	(S)	JUD AT 10:00 AM BUTROVICH 205
04/14/07	(S)	Heard & Held
04/14/07	(S)	MINUTE(JUD)
04/15/07	(S)	JUD AT 11:00 AM BUTROVICH 205
04/15/07	(S)	-- MEETING CANCELED --
04/16/07	(S)	JUD AT 1:30 PM BUTROVICH 205
04/16/07	(S)	Heard & Held
04/16/07	(S)	MINUTE(JUD)
04/17/07	(S)	JUD AT 3:30 PM FAHRENKAMP 203
04/17/07	(S)	<Teleconference Listen Only>
04/18/07	(S)	JUD AT 1:45 PM BUTROVICH 205
04/18/07	(S)	JUD AT 5:30 PM BUTROVICH 205

WITNESS REGISTER

MARCIA DAVIS, Deputy Commissioner
Department of Revenue
Juneau, AK
POSITION STATEMENT: Discussed changes in Version O CS for SB 104

DON BULLOCK, Attorney
Alaska Legal and Research Services Division
Legislative Affairs Agency
Alaska State Capitol
Juneau, AK 99801-1182
POSITION STATEMENT: Outlined changes in Version O CS for SB 104

ACTION NARRATIVE

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 2:03:16 PM. Present at the call to order were Senator McGuire, Senator Wielechowski, and Chair French. Senator Huggins and Senator Therriault arrived soon thereafter.

SB 104-NATURAL GAS PIPELINE PROJECT

2:03:35 PM
CHAIR FRENCH announced the consideration of SB 104 and asked for a motion to adopt Version O committee substitute (CS).

SENATOR WIELECHOWSKI motioned to adopt Version O, labeled 25-GS1060\O, as the working document.

CHAIR FRENCH objected for discussion purposes.

2:04:09 PM
MARCIA DAVIS, Deputy Commissioner for the Department of Revenue, introduced herself.

DON BULLOCK, Attorney with Alaska Legal and Research Services Division, introduced himself and clarified he was present to discuss the bill and not the policies. He summarized the five articles within AS 43.90 as follows: Article 1 is the purpose; Article 2 generally has the provisions relating to the licensee; Article 3 has the tax and royalty inducement provisions and a voucher option; Article 4 has miscellaneous provisions; and Article 5 has general provisions including the definitions.

MR. BULLOCK said he believes some sections have been moved into a more logical order. The abandonment provision was in 43.90.120 and now it's located in 43.90.240. That provision relates to whether or not a project has become uneconomic and ought to be abandoned. As a result of moving that section to the back, the sections numbered 43.90.130 through 43.90.240 in the resources CS now correspond to 43.90.120 through 43.90.230 in Version O

MR. BULLOCK explained that the provisions that relate to the inducement act coordinator and the expedited review by state agencies have been moved into Article 2 because they relate to the state's relationship with the licensee. Sections 43.90.400 and 43.90.410 in the resources CS are 43.90.250 and 43.90.260 in Version O. Also, the section that provides for development of a job training program is moved from section 43.90.420 in the resources CS to 43.90.470 in Version O.

2:06:46 PM
MR. BULLOCK said additional uncodified sections have been added at the end of the bill.

Section 5 states legislative intent that the first request for applications be made within 90 days after the effective date of this Act. That corresponds with a change made in the resources CS that said that the commissioners shall make the first request within 90 days after the effective date. He explained that that poses legal problems because it was unclear what would happen if the commissioners didn't action within 90 days.

Section 6 is a new section adding uncodified law. It states legislative intent that the courts expedite consideration of cases related to this Act.

Section 7 is uncodified law that makes the Act severable, meaning that if any section is found to be unconstitutional or otherwise invalid, the remainder of the Act is in effect. This section was moved from a codified section to an uncodified section and has no substantive change.

2:07:47 PM
Senator Huggins joined the committee.

MR. BULLOCK highlighted changes contained in Version O.

Page 2, line 15, relates to the monetary inducement given to the licensee. It says that the money that's provided to the licensee is subject to appropriation.

Page 3, line 12, relates to the 90 day requirement that was given to the commissioners to issue the first request for licenses. The language was changed to say "as soon as practicable" to give needed administrative discretion to act quickly, but not at the expense of being effective.

MS. DAVIS added that it links with the provision in the uncodified section.

MR. BULLOCK agreed.

MS. DAVIS noted a typographical error on page 3, line 6. Remove the comma after "assets" to clarify that "assets" and "work product" are in the same clause.

MR. BULLOCK continued to highlight changes.

Page 4, lines 8-10, relate to the list of requirements an applicant must satisfy when submitting an application. The new language requires an applicant to explain the practices for

controlling pipeline emissions as established by the U.S. Environmental Protection Agency.

Page 6, line 13 through page 7, line 30, which deals with the rolled-in rate versus incremental rate issue, was substantially rewritten by the administration.

CHAIR FRENCH asked Ms. Davis to provide an explanation.

2:11:52 PM
SENATOR THERRIAULT joined the meeting.

MS. DAVIS relayed that the provision imposes a requirement on how the pipeline owner will commit to handle future expansion costs. In the resource CS the section was a single statement that the cap on rolled-in rate treatment for expansion costs was 15 percent of the initial maximum recourse rate, but subsequent testimony indicated that public companies need to retain flexibility to negotiate rates as opposed to the maximum recourse rate, which she said is comparable to the "rack rate" in the hotel industry. To accommodate the request for flexibility, three mathematical caps are identified in Section 7(A): 1)An individual paying a maximum recourse rate agrees to pay 15 percent above that initial maximum recourse rate. 2)An individual that negotiated a rate agrees to pay 15 percent above that negotiated rate. 3)A shipper that comes along subsequent to the initial binding open season agrees to a cap that is 15 percent above the weighted average rate amongst the initial shippers. In response to a question, she explained that the different rates are weighted on the relative volumes.

2:15:17 PM
SENATOR WIELECHOWSKI asked about the thought process behind using a combination of incremental and rolled-in rates in Section 7(A).

MS. DAVIS explained that it flows from subparagraph (D). When an expansion costs more than the 15 percent cap, the cost up to the cap is proposed to be handled as a rolled-in rate while the costs in excess of that cap are essentially open for the pipeline company to propose incremental rolled-in rates as appropriate. Basically it's not mandating a treatment above the 15 percent cap, she stated.

SENATOR McGUIRE asked what it does to exploration if the pipeline company is allowed to do a combination of incremental and rolled-in rates.

MS. DAVIS explained that this is an effort to balance competing interests. Clearly an explorer would prefer rolled-in rate treatment through the entire process. But by the same token, initial shippers would like to see incremental rates at a certain point because it places the cost of the expansion that's beyond the cap, on the back of the expansionists.

SENATOR THERRIAULT added that it's somewhat balanced by the direction Congress gave FERC about not going into the realm of a subsidy.

MS. DAVIS said FERC certainly controls and governs the rules regarding interstate pipelines. That's why the language says that a pipeline will propose the support; it cannot mandate.

2:19:17 PM
SENATOR THERRIAULT opined that this appears to be a fair match with what FERC language says.

MS. DAVIS stated that the administration disagrees with some members of the producer group as to when a subsidiary kicks in. Ultimately FERC decides, but we believe this is a fair balance between the competing interests, she stated.

2:20:45 PM
MR. BULLOCK continued to highlight changes.

Page 9, line 6, has added language to require the applicant to commit to establish or use existing hiring facilities in the state and, as far as practicable, to use state job centers as well as Internet-based labor exchange systems.

Page 9, lines 11-13, contain a new paragraph 16 that requires an applicant to waive the right to appeal issuance of a license to another applicant or a determination by the commissioners that no license is awarded because no application sufficiently meets the state's needs.

Page 9, lines 15-18, contain a definition for project labor agreement.

Page 9, lines 22-29, outline that additional information is required of an applicant to disclose all affiliates and significant players in carrying out the project.

2:22:11 PM

SENATOR THERRIAULT asked if the administration suggested the language in paragraph 19.

MS. DAVIS replied the language is from the House CS and the administration didn't object. It acknowledges the large and complex business structure behind the applications and addresses the administration's desire to know about and fully understand the scope and extent of ownership of those entities. Representative Ramras wanted to be able to weight and evaluate the extent of ownership in various companies.

MR. BULLOCK highlighted a link between this section and the evaluation criteria in 43.90.170. He explained that part of the criteria relates to the evaluation of the project's likelihood of success. This type of information provides the commissioners the opportunity to look at the history of the applicant and the people the applicant plans to use to do the work. It basically gives the commissioners the body of information to work from.

2:23:54 PM
MS. DAVIS informed the committee that Senator French's recommendation regarding the treatment of confidential information that an applicant wants back had been accommodated, but it's in the wrong place. On line 18 the clause "and retained under this chapter" ought to go down on line 22. The last sentence in subsection (a) would read: "After a license is awarded, all information submitted by the licensee and retained under this chapter shall be made public."

CHAIR FRENCH found no objection to the change.

MR. BULLOCK continued to highlight changes.

Page 11, lines 14-20, contain a provision that appears in the House bill and is in the section relating to notice, review, and public comment on the applications. This allows information that would otherwise be confidential to be disclosed to the legislative auditor, the fiscal analyst who serves as head of the legislative finance division, their agents and contractors, and legislative members on the condition that they sign a confidentiality agreement prepared by the commissioners.

2:26:04 PM
CHAIR FRENCH asked about the deletion on line 6.

MS. DAVIS explained that on page 11, line 6, the phrase "not public records and" was deleted as a technical fix. Another

suggested clarification is to insert “of the confidential information” following “summary” on line 11, to clarify what is being summarized.

At ease from 2:27:25 PM to 2:27:48 PM.

CHAIR FRENCH removed his objection to adoption of Version O. Finding no further objection, he announced that Version O is the working document before the committee.

CHAIR FRENCH recapped the first suggested amendment and asked for a motion.

SENATOR McGUIRE moved Amendment 1.

Amendment 1

Page 3, line 6, following “assets”:
Delete the comma

CHAIR FRENCH announced that without objection Amendment 1 is adopted.

SENATOR McGUIRE moved Amendment 2.

Amendment 2

Page 10, line 18, following “licensee”:
Delete “and retained under this chapter”

Page 10, line 22, following “licensee”:
Insert “and retained under this chapter”

CHAIR FRENCH announced that without objection Amendment 2 is adopted.

2:29:14 PM
SENATOR McGUIRE moved Amendment 3.

Amendment 3

Page 11, line 11, following “summary”:
Insert “of the confidential information”

CHAIR FRENCH announced that without objection Amendment 3 is adopted.

MR. BULLOCK continued to highlight changes.

Page 13, line 2, contains the new language "proposes a project that". It clarifies that it's the project that will sufficiently maximize the benefits to the people. It's not the application.

Page 13, line 12, specifies that the notice that a licensee has been identified is delivered to the Senate President and the Speaker of the House.

Page 13, line 21 through page 14, line 10, provides for legislative approval of the commissioners' determination with the rules committee in each house having the responsibility of introducing a bill. The bill must pass in 60 days affirmatively approving the licensee or that licensee will be deemed rejected. At that point the commissioners would then decide whether or not to start the process over again.

2:31:44 PM
CHAIR FRENCH asked if that needs to be stated because when he read the provision, he took it to be an implication that the license goes away if the bill doesn't pass.

MR. BULLOCK cautioned against relying on implication and suggested adding language to say that if the bill isn't approved, then the license may not be issued. "This operates that way because only if there is approval do the commissioners have the authority to issue the license," he stated.

CHAIR FRENCH suggested adding "if the bill is not approved, the license may not be issued."

SENATOR WIELECHOWSKI agreed and said he's also concerned with the language on line 30 where it says that "issuance of the license approved by the legislature is a final administrative action". He opined that it should be a bill. If it's an administrative action there are administrative appeals, superior court appeals and supreme court appeals. "That's kind of the whole purpose of what we're trying to avoid here so I would suggest we figure out a way to change that," he stated.

MR. BULLOCK explained that the language is there because it's an executive branch function to issue the license with legislative approval. If issuance of the license is subject to appeal, then this simply establishes the date the clock starts for an appeal.

MS. DAVIS said she had the same question, but now that there's language in the earlier section that states that applicants waive the right to appeal the award and the decision to make no award, it's unclear how that would interact with this sentence unless someone who isn't an applicant would have standing to appeal.

CHAIR FRENCH said in addition to the applicants, there will be many other concerned citizens that will be interested to know just how this license is awarded. This recognizes the odd power-sharing between the legislature and the executive branch in the issuance of this license because there are separation of powers issues here. "The reality is that in order to preserve some right to challenge the issuance of that license, I think you have to put that flag post on there—the final administrative action. That's the way we signal that," he stated.

2:35:46 PM
SENATOR McGUIRE said she has grave concern with subsection (d). At one time the legislature had the authority to disapprove the license and now it's been changed to approving the license in 60 days. She pointed out that tremendous leveraging would occur and said she wonders if the administration has considered an escape valve. She noted that "in the regulatory writing arena we do have a process by which you have normal comment periods and so forth, but then we have emergency regulations that come in." The latter anticipates the unanticipated. She cautioned the administration and the committee members to think long and hard about the political ramifications of us not approving this in a 60-day period.

MS. DAVIS stated that the administration's approach from the start was to invite legislative involvement while ensuring that in the event of no action or inability to act, the process would still move forward. If the legislature had red flags, the idea was to create the opportunity for it to unify and point out a problem. "I believe our approach was whether by comity or agreeing to disagree as far as where the constitutional lines lay, this governor was open to listening to that red flag and that 'stop' and making sure that if the state moved forward, it moved forward on a unified basis or at least on a basis that didn't have a legislature affirmatively saying 'Don't do it.'" This cuts the balance differently. Basically it says the executive branch is doing a part and the legislative branch is undertaking the full responsibility for the project moving forward. That means that the project can only move forward if the legislature agrees that it should move forward.

MS. DAVIS said regardless of good faith, under the current language the risk of an inability to agree will have one of two outcomes. One is that the governor will honor the will of the legislature – as much as that can be done in the case of a non-decision as opposed to a firm decision of approval or disapproval. The other outcome is that if the governor sees it as an emergency, she might undertake the constitutional mantel that she believes she does have, and move forward. The current language "sets that stage for that kind of decision making to a future point." It doesn't have to be decided today and it may never be decided because the legislature recognizes the importance of the gasline and would feel great pressure to do something affirmative.

MS. DAVIS said she shares Senator McGuire's concern because no one knows what the future holds. "All you can do is have faith that everyone is going to do their job and that they're going to do it to the best of their ability and with the interest of Alaska in their hearts."

2:41:03 PM
SENATOR THERRIAULT said he has a separate train of thought on the issue and asked if something could be structured so that lack of action would be declared by law, to be legislative approval.

CHAIR FRENCH advised that he had a conversation with Tam Cook about that issue. He suggested that a sentence could be inserted to say that "failure of the legislature to approve the license results in the approval of a license." The difficulty is that weakens the claim for legislative authority to approve the contract. The reasoning is that if you believe the legislature has a legitimate role in approving the contract, yet a structure is established that essentially cuts the legislature out for failure to act, then someone claiming that the executive powers infringed would point to that provision. The argument would be that the legislature recognized that a failure to act means the license springs to life. Ms. Cook analyzed that as a chip in the wall of legislative authority, he said. "We could make that policy choice to insert the sentence, but it does weaken ... our claim on having a right to approve the license." He supplemented that saying that he agrees with Senator McGuire; good bills die all the time. "But I ultimately believe that the rule of 11 in the Senate and the rule of 21 in the House prevails." If certain small minority factions are trying to stop a bill there are many methods of overcoming those resistances as long as people are

willing to use every parliamentary rule at their disposal. Ultimately, the majority will in this building prevails no matter who is claiming the prerogative to bottle a bill up or subvert the will of the majority," he stated.

SENATOR THERRIAULT commented that's easier said than done, but this is probably of such importance to the state's future that all of those things would be considered.

SENATOR THERRIAULT relayed his concern about the 60-day timeline. Originally it was 30 days and the House decided on 90 days. Although he hadn't heard all that debate, he thought it was predicated on the fact that the legislature wouldn't be in session while the administration was evaluating different scenarios. He said he believes that language in the bill says that as soon as the bids are unsealed, the legislature and its consultants get that information. We could be evaluating and questioning those proposals right along with the administration, he said. If we hit the ground running we certainly don't need 90 days.

SENATOR THERRIAULT said if the legislative session starts in February as some legislation suggests, then 60 days puts the timetable into April, which might impact a full and robust field season.

2:45:47 PM
MS. DAVIS said 60 days recognizes the resource committee's concern that it ought to be more than 30 days and 90 days. She noted that the new language does give the legislature the opportunity to hit the ground running and she fully expects the legislature to be aggressively and actively engaged in looking at and discussing the applications with the commissioners as they're submitted. With that in mind, we continue to believe that 30 days is a better target, she stated.

With regard to field season, a company that's been designated the selected applicant is going to be on notice that it needs to start thinking about jumping into action as per the project plan that was outlined. If this next session begins in February, 30 days out is the beginning of March and in 60 days it's into April. She envisions that an applicant can make some contingency planning, but not entirely since the field season requires contractual commitments for some expensive on-the-ground work. They might work on permitting in advance, but lining up resources and equipment is risked capital so they might be wary.

She couldn't speak for the various companies, but 30 days would certainly be easier than 60 days.

MR. BULLOCK said his concern with time relates to the unknown scope of the legislative review. If it's limited to a review of the application that the commissioners bring forward then 30 or 60 days would probably be reasonable. However, if the legislature looks at other options and effectively does the same evaluation and ranking that the commissioners did to come up with a decision, then it'll take more time.

2:49:44 PM
SENATOR WIELECHOWSKI said if 60 days is the choice for this bill, he would suggest changing the 90 day session bill so that the session starts earlier next year.

CHAIR FRENCH said as a point of order, nothing in this bill mandates when the 60 day consideration begins. It could be in a special session. He noted that subsection (c) at the top of page 14 envisions back-to-back special sessions in which the bill would carry over from one to the other. It will probably mandate a two-thirds vote because it essentially suspends a Uniform Rule. The committee should consider that there's no tie between the start of session and the start of deliberation of AGIA.

CHAIR FRENCH pointed out that inserting legislative approval does diminish the due process rights of the unsuccessful licensees. He said he can see that this is going to create a winner track and a loser track and those unsuccessful applicants are going to ask to have their cases heard and their proposals considered. That's why 60 days is in the right zone, he stated.

2:51:51 PM
SENATOR McGUIRE said the reality is there will be more to do during that 60-day period than just analyzing the licensee. "I'm just concerned about the approval part," she said.

CHAIR FRENCH reminded members that the bill wouldn't leave the committee today so there's time to think about changes. He said he would suggest inserting language that says "If the bill is not approved, the license may not be issued." He said he'd ask Mr. Bullock about where to insert the sentence, but it looks as though the beginning of subsection (d) would be a good spot.

MR. BULLOCK said he believes that'd work, but he'd give it more thought. He noted that on page 13 it says that issuance of the license approved by the legislature is a final administrative

action. If it isn't approved, he suggests saying it is deemed not approved on day 61. The way it's set up you're going to have the winner, the loser, and the almost winner. The almost winner is the one that was recommended to the legislature and never approved. It's at that point that you'll possibly see the separation of powers challenge, he cautioned.

SENATOR McGUIRE asked if there's a severability clause.

CHAIR FRENCH said it's on page 30.

SENATOR McGUIRE asked what would happen under the severability clause if the court agreed with an executive branch challenge that the legislature was attempting to usurp the rightful executive branch authority.

MR. BULLOCK said he wouldn't necessarily expect the court to say the provision is invalid. It's that the legislature didn't have the authority to approve an executive branch act under Article 3, Section 1.

SENATOR McGUIRE said her research shows there are places the court would rightfully rule that the legislature has minimal authority relating to items of appropriation and taxation powers. She asked if he could envision the court bifurcating the question.

2:56:17 PM
MR. BULLOCK said the legislature has the power of appropriation so that's one control over how this goes forward, but the executive branch has the ability to move funds within certain accounts, so it could go forward anyway. Another separation of power issue is the appointment of the inducement act coordinator because there's question whether legislative approval of the nomination is within the scope of the constitution. As long as the governor is working with the legislature and acting in comity, the administration wouldn't be likely to raise the separation of powers issue, but someone from the public could. The licensee that gets presented to the legislature and doesn't get approved may be the first one at the court door, he said.

SENATOR THERRIAULT asked if an application is gone forever if it's selected, but the legislature either turns it down or takes no action on it.

MS. DAVIS explained that when the commissioners submit a notice of selection, the legislature undertakes a review of that

decision making process. Invariably what has and has not been selected in that process will be looked at so the unsuccessful applicants' information flows through into that process. If the legislature approves the commissioners' selection, then it moves forward. If an applicant challenges the decision, presumably it would have to be done on a constitutional basis because the applicant waived the right to challenge the non-selection. If the legislature declines to approve the licensee, and the executive branch honors that decision, the AGIA language says the commissioners may request new applications so the process could start over. A second round might be fast tracked depending upon what the commissioners thought was out there by way of additional applications or what they learned in the legislative review process. Certainly an unsuccessful applicant would not be precluded from participating, she stated.

Recess from 3:00:13 PM to 3:00:34 PM.

CHAIR FRENCH said without question this has been and continues to be one of the stickier policy issues in the bill. I don't know if we're going to solve it before the bill leaves the committee tomorrow, but if you bring me language today or tomorrow we'll try and accommodate it, he said.

SENATOR McGUIRE asked Chair French to request leave from whatever committee commitments members have to provide time to work on this. "I think it's going to take more than the potentially allotted time," she said.

SENATOR McGUIRE objected to the language Chair French suggested inserting in subsection (d) because in her view it further delineates that point. "I'd like to think overnight about whether we go that direction or not," she said.

CHAIR FRENCH said, "To the extent that I've offered an amendment, I'll withdraw it."

3:02:14 PM
MR. BULLOCK continued to highlight changes.

Page 15, lines 15 and 19, relate to improving the net present value when the commissioners are considering modification to the project plan. It's tied to the valuation and the ranking criteria.

SENATOR WIELECHOWSKI mentioned the AOGCC testimony and asked if this might be a good place to address the lack of information that's available regarding offtake from the North Slope.

MS. DAVIS said she's thought about how a reasonable applicant could step forward and make application with the question still in the air as to what the AOGCC will ultimately determine regarding an appropriate offtake level for gas from Prudhoe or from other fields. For several years now everyone has heard that 4.3 bcf/day to 4.5 bcf/day offtake is reasonable and appropriate given everyone's understanding of the field, its geology, and its reservoir. The question is where's the point in time that you check the box that AOGCC is on board and comfortable with offtake rates. Applicants, independents in particular, are legitimately concerned and it wouldn't be inappropriate to put in language saying that a modification or amendment can be allowed as necessary as a result of AOGCC rulings that affect gas offtake.

3:07:53 PM
CHAIR FRENCH asked Senator Wielechowski if he had specific language in mind.

SENATOR WIELECHOWSKI said he'd work on language tonight and tomorrow and reiterated that he was very surprised to learn that the state is proceeding with a pipeline yet it has no idea how much gas is available for offtake on the North Slope.

MS. DAVIS clarified that the testimony yesterday was that AOGCC, as the primary policeman on reservoir management issues, is privy to confidential information through the producers' very extensive and expensive reservoir model. But as a royalty owner the state also has the benefit of that information so it's not quite correct to say that it doesn't have access to the reservoir information. There's a division within the Department of Natural Resources (DNR) that has access to the commercially sensitive well information, but it's not available to anyone beyond that group. If the state were to come forward as the complaining party she said she presumes there would be an opportunity for a debate, but it would be in a manner that protects the confidentiality of the information. Clearly, DNR does not own that reservoir model so there are tools the state doesn't possess. But before we build our own reservoir model for the purpose of challenging the producers' model, she said to remember that we all share the same goal. We can assume the best and work cooperatively and if we're wrong we'll deal with it at that juncture.

3:12:36 PM
MR. BULLOCK continued to highlight changes.

Page 17, lines 23-26, relate to the abandonment provision and the arbitration panel that would decide whether the project has become uneconomic. Line 23 says that the law of the state will be applicable during the panel's review. Line 24 says that the judgment on the award rendered by the arbitrators may be entered in the state superior court. Lines 25 and 26 say that the commissioners and the licensee will pick their respective arbitrators from a list that's provided by the American Arbitration Association.

3:13:42 PM
SENATOR WIELECHOWSKI explained that an arbitration association typically provides a list of 9 or 11 names and then the appointment of the third arbitrator comes from the entire national roster. He suggested the committee give some thought about how the list would be provided as well as the size.

MS. DAVIS stated that she and Mr. Bullock would be comfortable having all the arbitrators selected from the entire American Arbitration Association national roster.

SENATOR WIELECHOWSKI voiced agreement.

CHAIR FRENCH said he's compelled to point out that this project could be stopped by two arbitrators. He asked what thought the administration has given with respect to an appeal of the arbitrators' decision.

MS. DAVIS replied we have been comfortable allowing an appeal to be on the same basis as any other appeal, which is abuse of discretion.

CHAIR FRENCH asked if that works by operation of law or if something needs to be added to the bill to be explicit.

MR. BULLOCK said he doesn't know.

MS. DAVIS said she understands that unless it's stated otherwise, the standard for review of an arbitrator decision is abuse of discretion.

CHAIR FRENCH said that item's been nagging and he couldn't let the moment pass without saying something. He suggested the committee talk more about that.

3:16:40 PM
MS. DAVIS highlighted a technical correction on page 17, line 21, and suggested the committee change the word "or" to "and" and the word "does" to "do".

CHAIR FRENCH restated the suggested technical amendment and asked if there was objection to the motion.

Amendment 4

Page 17, line 21, following "commissioners":
Delete "or"
Insert "and"

Page 17, line 21, following "licensee":
Delete "does"
Insert "do"

SENATOR WIELECHOWSKI asked for discussion.

MR. BULLOCK said it comes down to who they disagree with; the commissioners' are on one side and the licensee is on the other.

CHAIR FRENCH suggested going through the logic chain. On lines 16 and 17 it says if the commissioners and the licensee agree that it's uneconomic, then it's over.

SENATOR WIELECHOWSKI asked what happens if one party disagrees.

CHAIR FRENCH asked who they disagree with because they don't disagree with themselves.

SENATOR McGUIRE said they could disagree with the proposition.

MR. BULLOCK said it's conceivable that the commissioners would disagree with each other.

SENATOR McGUIRE said she sees it as disagreeing with the proposition of economic viability.

CHAIR FRENCH said he thinks they'd disagree with the judgment of the other. The decision about whether it's economic hasn't been made; one thinks it's economic and one thinks it isn't.

SENATOR WIELECHOWSKI removed his objection.

CHAIR FRENCH found no further objection and Amendment 4 passed.

3:20:08 PM
MR. BULLOCK continued to highlight changes.

Page 18, lines 4-14, contain a new subsection that requires the arbitration panel to make specific findings to conclude that the project is uneconomic.

CHAIR FRENCH noted that this leads to a new definition.

MS. DAVIS said this is the long awaited definition of "uneconomic." She explained that there are two core elements for a project being uneconomic. The first is when a project doesn't have sufficient credit support to finance the construction of the project through firm transportation commitments or financing. She suggested the committee insert on line 8, after the word "commitments" the words "government assistance or other sources of financing". [strike "or financing"]

SENATOR McGUIRE asked if it's important to define other sources of financing.

MS. DAVIS said once you start the list it'd be difficult to stop.

SENATOR McGUIRE moved Amendment 5.

Amendment 5

Page 18, line 8, following "commitments":
Strike "or financing"
Insert "government assistance or other sources of financing;"

CHAIR FRENCH found no objection and announced that Amendment 5 is adopted.

3:24:04 PM
SENATOR McGUIRE referenced page 18, line 6, and asked why the evidence standard is a "preponderance of evidence" as opposed to "clear and convincing evidence."

MS. DAVIS said the definition was analyzed from many contexts and the preponderance of evidence standard seemed to be a fair approach. She noted that there was concern that independents might feel that the deck had been stacked and that it would be difficult to extract themselves. We thought this was a commercially reasonable approach, she said.

CHAIR FRENCH said from a policy standpoint this seems to be a counter argument to the folks that are saying the AGIA bill is potentially a bad marriage that won't be over for 11 years. In my mind, this is one of the circuit breakers, he said. If the project is going bad because it's being poorly handled or because the economics collapse, you get out by going to the arbitrators and getting a decision.

3:25:47 PM
MS. DAVIS read the second part of the definition and said it's designed so that arbitrators could look forward and ask whether a project has a reasonable likelihood of being economic based on factors that have to be plucked from the future. We think we've struck a good balance, she stated.

CHAIR FRENCH asked if a 100 percent load factor would be whatever is proposed as the initial thruput.

MS. DAVIS said yes.

SENATOR WIELECHOWSKI referenced lines 11 and 13, and asked why it talks about a producer rate of return and the upstream investment as opposed to a pipeline rate of return and a midstream investment.

MS. DAVIS explained that both the producer rate of return and the incremental upstream investment refer to costs that are upstream of the inlet to the pipeline. The upstream investment that's required is somewhat vague because it depends upon what part of the project is being provided by the pipeline. The idea is to identify the body of costs and the likely revenue to see if the net provides a prudent reasonable rate of return for a prudent company. That's what an arbitrator would look at when making a decision, she stated.

3:31:03 PM
MR. BULLOCK continued to highlight changes.

Page 18, lines 23 and 24, has changed language that says if the licensee and the state agree or the arbitration panel finds that

the project is uneconomic there's a list of things that the licensee must assign to the state. Compensation for the assignment has been narrowed to the net amount of the licensee's qualified expenditures under 43.90.110. Those are expenditures for which the state contributes.

3:32:42 PM
Page 18, line 29, relates to the Alaska Gasline Inducement Act coordinator. The coordinator position is placed in the Office of the Governor and that office is required to provide administrative support.

Page 19, lines 5 and 6, add language stating that the AGIA coordinator may be removed from the position at the discretion of the governor.

SENATOR THERRIAULT asked about the constitutionality of confirmation by the legislature.

MR. BULLOCK said this bill doesn't make a change, but it does raise a constitutional issue. The constitution authorizes legislative confirmation of the head of an executive branch agency and members of certain boards and commissions. This position isn't like a board or commission and it doesn't have commissioner type power; it's more an ombudsman role, he stated.

3:34:48 PM
SENATOR THERRIAULT said if the position isn't quasi judicial or doesn't have powers of a commissioner, then he doesn't know what the justification is for inserting legislative involvement because it could be an unnecessary constitutional glitch.

SENATOR McGUIRE asked if someone could refresh her memory about what powers Drue Pearce has as Federal Coordinator for Alaska Natural Gas Transportation Projects.

MR. BULLOCK explained that this position is modeled after the federal coordinator position and the president makes the appointment.

CHAIR FRENCH said striking the sentence that says the appointment is subject to confirmation by the legislature would remove any question of a problem. Responding to a question, he said he didn't have strong feelings either way.

MR. BULLOCK advised that the committee has the option of achieving whatever goal it likes by developing particular duties or powers of the position.

CHAIR FRENCH said it's something for the committee to mull over.

3:37:14 PM
MR. BULLOCK advised that there were no changes in 43.90.260. The provision was simply relocated.

Page 19, lines 30 and 31 through page 20, line 2, relate to a voucher. It says that in addition to the people that qualify for the resource inducement because they acquired firm transportation capacity during the first binding open season, a person with a voucher can also take advantage of the tax and royalty inducement.

CHAIR FRENCH noted that on line 29, the reference to the tax exemption inducement was removed. He asked Mr. Bullock if he had any comment.

MR. BULLOCK said no; it goes back to discussions on Article 9, Sections 1 and 4 as to whether taxing power can be contracted away. The inducement in 43.90.310 refers to the royalty inducement that is contractual between the state and the producers. On page 22, lines 17 through 22, language was removed that refers to the certificate issued by the commissioner of revenue that provides a contractual basis for the tax exemption.

CHAIR FRENCH highlighted the fact that this is a big policy change because it makes the tax exemption a general law exemption. In your view and parenthetically in my view this makes it more likely constitutional, he stated. If it's contractual, it's more likely unconstitutional.

MR. BULLOCK expressed the opinion that it's consistent with Article 9 Sections 1 and 4. Section 1 says the state can't contract or suspend the power to tax except as provided in the Article. Section 4 allows exemptions to be created by general law. He said that in this case it's created by general law, and the 10 year provision expresses the intent of the legislature at the time of enactment. If there's a fiscal crisis, the state wouldn't need to argue whether a law is impairing the obligations of a contract thereby raising Article 1, Section 15 issues. It's just a matter of general law. The power of the legislature is there, but the political question is whether the legislature would actually vote to change this section given the

expected reliance on the intent at the time of enactment. If there's a problem 8 years down the road some legislators won't support a change because of that intent and others will argue it's necessary and the legislature can make the determination as it comes up, he said.

3:41:57 PM
SENATOR WIELECHOWSKI stated for the record that if this is ever reviewed, his intent is that having this provision in the bill is an exemption. It's permissible under Article 9, Section 4 of the constitution and it's intended to be an inducement to industry.

SENATOR THERRIAULT said, "I wonder if Ms. Davis wants to concede defeat or the administration still has a different view that, in fact, AGIA is the law of general application."

MS. DAVIS said yes; we continue to believe that the contractual underpinnings are important in that they amplify the ability to ensure fiscal certainty through the impairments clause. Also, we don't believe it restricts it from being considered a general law, she stated.

3:43:17 PM
MR. BULLOCK pointed out that the other problem with these constitutional issues is when they might be considered by the court. It goes back to declaratory judgment issues and the court not taking action until the issue is actually presented, he said. If the issue is whether or not the contracting away is unconstitutional, the court may say it's speculative as to whether there would be a constitutional problem. If it's dormant, the court would say wait and see what happens. Even though the bill creates a statute of limitation for bringing a constitutional challenge, it's in the court's discretion to accept it or not. The court might say it's not going speculate on whether 8 years down the road the legislature is going to increase the tax, which would trigger the action under this section.

MS. DAVIS said on the issue of ripeness, we would see this as not a dormant issue from the beginning. There are companies essentially offering to contract with the state for billions of dollars in reliance upon that provision being valid and constitutional. So there are live actions in the hearing today that are affected by whether or not that law is constitutional. So we would argue fervently that the issue can be resolved sooner rather than later.

CHAIR FRENCH said it sounds as though you'd welcome a constitutional challenge immediately after the bill goes into effect.

MS. DAVIS said we are in favor of fiscal certainty and anything that resolves question in applicants' and participants' minds is good for the process.

SENATOR McGUIRE commented the legislature doesn't do things quickly so it's likely that there won't be a tax change for 10 years. She said she can see both sides clearly, but she can't get away from the notion about one legislature binding another. She said she also recognizes the commercial reality the administration is facing. She said she knows the folks in this room need certainty to predict economics, but there's some precedential concern about future industries coming forth with similar arguments.

3:47:43 PM
MR. BULLOCK said he has two points of view as to whether the power to tax can be contracted away. His opinion is that it would be unconstitutional, but as a legislative attorney he advises caution because it has to do with impairing legislative power in the future.

MR. BULLOCK continued to highlight changes.

Page 20, lines 9 and 10, and page 22, lines 21 and 22, have similar provisions for the royalty and tax inducements that refer to the voucher that's created in the 43.90.330. Without the changes the royalty inducement and tax inducement could only be enjoyed on the gas that's transported in the capacity that was acquired by the producer. This section recognizes that the voucher has been created and it gives another option to qualify for the inducements.

Page 22, line 30 through page 23, line 8, is a new section that provides for inducement vouchers.

CHAIR FRENCH asked Ms. Davis for an explanation.

MS. DAVIS explained that 43.90.330is the provision that allows a buyer of gas from a producer on the North Slope to be able to acquire capacity in a pipeline at the initial open season and place that gas into the pipe and ship it. In all likelihood this will be a mechanism used by in-state purchasers of gas, she

said. We wanted to ensure that there was a means for buyers willing to make a commitment in an initial open season to be able to negotiate the more favorable pricing provisions that would flow from having the associated royalty and benefits. This provision has been designed to enable that commercial transaction. As previously written, the only people who could enjoy royalty and tax benefits were the producers themselves.

SENATOR McGUIRE stated emphatic support for the provision.

MS. DAVIS said it's a complex topic, and it needs a bit more tweaking, but she hopes to have the final language either tomorrow or when the bill is before the finance committee.

CHAIR FRENCH stated that he shares the general enthusiasm for the policy direction, he recognizes the complexity of the topic, and he appreciates that more work needs to be done.

3:53:20 PM
CHAIR FRENCH recessed the meeting until 5:30 pm.