

**SCOMM**

**155:35**

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

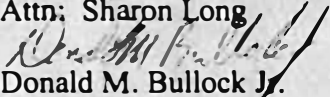
State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

June 7, 2008

**SUBJECT:** Amending the Alaska Gasline Inducement Act  
(Work Order No. 25-LS1714)

**TO:** Senator Charlie Huggins  
Chair of the Senate Special Committee on Energy  
Attn: Sharon Long

**FROM:**   
Donald M. Bullock Jr.  
Legislative Counsel

You asked for an opinion about the effect of amending the Alaska Gasline Inducement Act (AGIA)<sup>1</sup> on the proposed license being considered during this Third Special Session.

You did not submit a proposed amendment or indicate whether the amendment would have an effect on the state's obligations under the license, the licensee's obligations, or both. AGIA offered inducements in return for commitments and conditions agreed to by a successful licensee. A material reduction in inducements or a material increase in the obligations, costs, and commitments of the licensee without rejecting the issuance of the license the commissioner of revenue and the commissioner of natural resources (commissioners) have forwarded for consideration raises complex issues regarding the doctrine of separation of powers and the process for determining a complete application under AGIA.

The legislature has before it the determination by the commissioners that the project proposed by TransCanada Alaska Company, LLC and Foothills Pipe Lines Ltd. (together, "TransCanada") will sufficiently maximize the benefits to the people of the state and merits the issuance of a license.<sup>2</sup> The commissioners made the determination after soliciting proposals and after TransCanada submitted its application under the terms and conditions of AGIA. AGIA includes inducements the state offered<sup>3</sup> and the requirements and obligations an applicant must satisfy or agree to in order to qualify for a license.<sup>4</sup>

---

<sup>1</sup> AGIA is codified at AS 43.90.100 - 43.90.990.

<sup>2</sup> See AS 43.90.180(a).

<sup>3</sup> AS 43.90.110.

<sup>4</sup> AS 43.90.130.

Senator Charlie Huggins  
June 7, 2008  
Page 2

AGIA also provides resource inducements as incentives for encouraging persons with natural gas resources to commit to the project proposed by the licensee.<sup>5</sup>

Based on AGIA, and in response to the request for proposals issued by the commissioners, four companies submitted applications that the commissioners found to be incomplete, two companies submitted letters explaining why they were not submitting applications, and TransCanada submitted an application that was found to be complete and ultimately submitted by the commissioners to the legislature for approval.<sup>6</sup> If the legislature approves the issuance of the license, the commissioners are required to issue the license as soon as practicable.<sup>7</sup>

If the legislature fails to pass SB 3001, HB 3001, or some other legislation that approves the issuance of the license the commissioners have recommended within the 60 days after June 3, 2008,<sup>8</sup> the proposed license to be issued to TransCanada dies. Without legislative approval of the proposed licensee, AS 43.90.190(d) prohibits the commissioners from issuing the license the legislature failed to approve, but allows the commissioners to start the process over again by requesting new applications for a license. If AGIA is amended in conjunction with the failure to approve the TransCanada project, the amendments would be incorporated in a new request for proposals, should the commissioners opt to begin the process again.<sup>9</sup>

---

<sup>5</sup> AS 43.90.300 - 43.90.330.

<sup>6</sup> The four incomplete applications were submitted by Aenergia, LLC; the Alaska Gasline Port Authority; the Alaska Natural Gas Development Authority; and Little Susitna Construction Company of Anchorage, Alaska, and its prime sub-consultant, subcontractor, Zhongyuan Engineering General Construction Company of ZPEB SINOPEC, Design Institute of ZYEC SINOPEC, and its ZPEB SINOPEC International Division, all part of China Petroleum and Chemical Corporation. The two companies that wrote to explain why an application would not be submitted are BG Group, plc, and MidAmerican Energy Holdings Company. Information on the AGIA application process is published on the Governor's web site at <http://www.gov.state.ak.us/agia/> (accessed June 6, 2008).

<sup>7</sup> AS 43.90.190(b).

<sup>8</sup> This schedule presumes that the President of the Senate and the Speaker of the House both received the determination by the commissioners on the first day of the Third Special Session. AS 43.90.190(b) requires the legislature to pass a bill approving the license within 60 days "after the last date a presiding officer receives a determination by the commissioners" before the commissioners may issue the license. By my count, August 2, 2008 would be the last date for having a bill pass that approves the current proposed licensee.

<sup>9</sup> Given the legislature's discretion to approve or disapprove the proposed license under AS 43.90.190, the issue of the legislature's disapproval of the current proposal and the

If the legislature fails to approve the TransCanada license or amends AGIA, there is the possibility that the commissioners may nevertheless issue the license under the terms of AGIA as originally enacted under the separation of powers doctrine.<sup>10</sup>

**Potential for issuing a license without legislative approval or without AGIA amendments.**

When it comes to legislative approval of executive branch contracts, and the license under AGIA is a contract, the Attorney General's office has long held that legislative approval is a violation of the separation of powers. The Attorney General's office stated its views quite plainly in the following excerpt from a 1982 informal opinion:<sup>11</sup>

In approving individual contracts, the legislature does not exercise a lawmaking function. Consequently, in the absence of a constitutional grant of such power or some unique circumstance that we cannot presently contemplate, a statute requiring legislative approval of an individual contract is a violation of the separation of powers. See *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980). In *Public Defender Agency v. Superior Court, Third Judicial District*, 534 P.2d 947 (Alaska 1975), the Alaska Supreme Court held that the doctrine of separation of powers, though not expressly set out in the Alaska Constitution, is clearly implied. See also Minutes of the Alaska Constitutional Convention 1955-56, at 2228-29. Furthermore, the court has expressly recognized that it was a purpose of the framers of the Alaska

---

amendment of AGIA before new proposals are subsequently solicited are political questions and can be expected to be found nonjusticiable by the courts. *Department of Natural Resources v. Tongass Conservation Soc'y*, 931 P.2d 1016, 1019 (Alaska 1997) ("Imputing a motive to the legislature for failing to act risks expressing a lack of respect for that branch of government. Further, there are no 'judicially discoverable and manageable standards' which might be used to resolve the question as to why the legislature failed to take a particular action.")

<sup>10</sup> The doctrine of separation of powers between the executive and legislative branches is based on the constitutional allocation of power in art. II, sec. 1, and art. III, sec. 1, Constitution of the State of Alaska.

<sup>11</sup> 1982 Inf. Alaska Atty. Gen. Op. (file no. 366-269-83), November 3. The Attorney General's office has reiterated this position at least two other times in opinions. See 1085 Inf. Alaska Atty. Gen. Op. (file no. 166-065-86), August 13, and 1987 Inf. Alaska Atty. Gen. Op. (file no. 663-88-0094), September 17 (noting "the position of the Department of Law has consistently been that such requirements of legislative approval are unconstitutional as a violation of the doctrine of separation of powers").

Constitution to create a strong executive branch of government. *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976).

The separation of powers issues arises under art. III, sec. 1 (powers of the governor), and art. II, sec. 1 (powers of the legislature), Constitution of the State of Alaska. A governor may waive the separation of powers and involve the legislature in a process to which the legislature would otherwise be excluded but the governor's mind may change. Such was the case in *Bradner v. Hammond*, wherein the court noted in a footnote:<sup>12</sup>

The attorney general candidly admitted at oral argument that examination of practice between the legislative and executive branches since statehood indicates that the executive has at least acquiesced to legislative confirmation of certain subcabinet officials. However, he argued that the political reality of a legislature dominated by the same party as that of the governor, as well as the minor interference such intervention created, indicates that the executive stance in the past should not be read as a "constitutional interpretation by a coordinate branch of government," but rather as a product of a realistic ordering of executive goals at the time.

Despite the precedence of governors submitting subcabinet appointments to the legislature for confirmation, when the issue was presented to the court of whether confirmation was required under the state constitution, the court found that the executive could make those appointments without legislative confirmation.

With regard to AGIA, Governor Palin wanted the legislature to participate in the process leading to the issuance of a license and appears to have initially waived the constitutional power to enter into a contract without legislative confirmation. In the AGIA bills introduced at the request of the governor -- HB 177 and SB 104 -- the governor proposed that the legislature could stop the issuance of a license. In both bills, the proposed AS 43.90.200(a) and (b) described the legislative involvement as follows:

**Sec. 43.90.200. Legislative action; issuance of license.** (a) A determination and notice of intent to issue a license under AS 43.90.190 is a final agency action, effective under this chapter on the 30th legislative day after the date of referral to the legislature, unless the notice of intent is disapproved by joint resolution of the legislature. After the determination and notice of intent are effective under this subsection, the commissioners may issue the license under this chapter.

(b) If the legislature disapproves the notice of intent to issue a license before the 30th legislative day after referral, the commissioners may commence another public process under AS 43.90.130 to request applications.

---

<sup>12</sup> 553 P.2d 1, 5 n. 5 (Alaska 1976).

In the initial proposal for legislative involvement, the legislature could stop the issuance of a license by passing a joint resolution; if the legislature did nothing, the commissioners could issue the license. In other words, the legislature had only "red light" power -- only the power to stop the license.

As consideration of the legislation progressed, legislative involvement was changed from being able to stop the issuance of a license, by passing a joint resolution, to requiring the legislature to approve the issuance of a license in the form of a bill. The change in vehicle from a joint resolution to a bill was required because the legislature would or will be taking action that has a binding effect on those outside of the legislature.<sup>13</sup> Thus the legislative power was changed from "red light" to "green light" -- the ultimate power to go forward with the license became contingent upon legislative approval.

While it may be argued that the authority for the executive to issue a license under AGIA as originally enacted is not fully granted until the proposed license is approved by the legislature, there may still be a challenge to this approach under the separation of powers doctrine. Should the commissioners issue the license without legislative approval or without subsequent amendments to AGIA, and the legislature or another party challenges the license, the commissioners could argue that issuing a license that is consistent with the original statutory requirements (other than the requirement of legislative approval) is authorized by the constitution under the separation of powers doctrine. If the commissioners' argument is successful before the court, art. I, sec. 15, Constitution of the State of Alaska, would prohibit the legislature from passing a law that impairs the obligation of that contract by trying to change the terms of the license.

In the course of considering whether the executive has the power to issue the license without legislative approval, the court may also address whether the legislative approval in AS 43.90.190 is unconstitutional. Despite the severability provision in AGIA,<sup>14</sup> the court could find that the legislative approval requirement was such an integral part of the intent of the legislature in enacting AGIA that the requirement could not be severed.<sup>15</sup>

---

<sup>13</sup> See, *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 773 (Alaska 1980) (when the legislature wishes to act in an advisory capacity it may act by resolution; however, when it means to take action having a binding effect on those outside the legislature it may do so only by following the enactment procedures).

<sup>14</sup> Sec. 8, ch. 22, SLA 2007.

<sup>15</sup> The court discussed legislative intent for an Act and the severability of a provision of that Act in *Alaskans for a Common Language, Inc. v. Kritz* as follows:

[T]he court's severance powers are restrained by the same constraints that fence its powers to adopt limiting constructions: "If a court finds a statute or portions of it unconstitutional, it has the power to strike it down or sever the invalid portion. It does not have the power to redraft the statute

However, given the elaborate requirements for the qualification of a licensee, the duties of the executive to solicit and evaluate proposed pipeline projects, and the enactment of a severability clause (as opposed to relying on the generally applicable severance clause in AS 01.10.030), it is likely that the court would sever the legislative approval provision and uphold the remainder of the Act.

**The effect of an amendment to AGIA.**

There is no authority within AS 43.90 for the legislature to do anything with regard to a license proposed to be issued by the commissioners other than to approve or disapprove the issuance of the license. AS 43.90.190(a) requires the rules committee in each house of the legislature to "introduce a bill in the committee's respective chamber that provides for the approval of the license proposed to be issued by the commissioners." Two things are particularly noteworthy in this mandate. First, the bill is to provide for the *approval* of the license, and not a bill "relating to the issuance of a license"; if the bill passes, AS 43.90.190(b) requires the commissioners to "issue the license as soon as practicable after the effective date of the Act approving the issuance of the license." Second, the issue before the legislature is the "approval of the license proposed to be issued by the commissioners," not some other license or variation. Rhetorically, if the legislature tries to change the terms and conditions, is the bill that passes the "license proposed to be issued by the commissioners," or a different license? There is also an issue under the separation of powers doctrine as to whether the legislature or the executive is the branch with the authority to negotiate contractual terms. This separation of powers issue is discussed above.

If the legislature makes changes to AGIA that require additional or different requirements from those offered by TransCanada in its application, the application would no longer be complete. Under AS 43.90.140, the commissioners are required to reject applications that do not satisfy what are commonly referred to as "must haves" in AS 43.90.130. An application that does not contain the required provisions may not be forwarded to the legislature for consideration.

Additionally, should the legislature modify the license terms, including amending the

---

as that is the province of the legislature." *Thus, not only must the remaining portion of a severed statute be "valid as a law by itself," but it must also "give effect to the apparent intention of the legislature" that enacted the original provision.* Just as a court must do when it considers adopting a narrowing construction, a court contemplating severance must initially determine that "severing the invalid portion will not do violence to the intent of the legislature." If the court determines instead that "by sustaining only a part of a statute, the purpose of the act is changed or altered, the entire act is invalid."

Senator Charlie Huggins

June 7, 2008

Page 7

requirements for a license in AGIA, nothing in AGIA requires the party submitting the proposal to accept the modified license. If the legislature does not approve the issuance of the license that the commissioners have proposed, it may identify its reasons for not approving the license in a letter of intent or similar document. If the commissioners choose to request new applications, they could revise the requirements in the request for applications issued under AS 43.90.120 to address the concerns of the legislature and the amendments that might be made to AGIA.

A legislative finding that the project proposed by TransCanada's fails to sufficiently maximize the benefits to the people of the state and, therefore, does not merit the issuance of a license begs the question as to whether the failure is with the application or the underlying law. If the legislature determines that the problem is with the law, it could consider amending AGIA, but those amendments will, of course, be vulnerable to a veto.

AGIA is a law like any other law subject to amendment and revision by the legislature. If AGIA is amended in the course of considering the award of the license to TransCanada and awards the license to TransCanada, or the legislature attempts to negotiate different terms for the license, other applicants for the license may challenge the award on due process and equal protection grounds. Although the applicants were required to waive the right to appeal the issuance of a license to another applicant under AS 43.90.130(16), it is my opinion that if the process and requirements for the license are changed by the legislature, the courts would consider a constitutionally-based challenge to the process.

In conclusion, I caution against amending AGIA or attempting to negotiate terms of the license with TransCanada. An amendment to AGIA may void the current license application as incomplete and the negotiation with the proposed licensee may be found by a court to be beyond the power of the legislature under the separation of powers doctrine.

DMB:ljw  
08-253.ljw

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

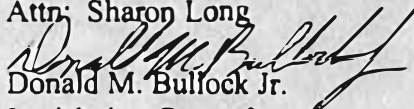
State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

June 10, 2008

**SUBJECT:** Application of the Alaska Natural Gas Transportation Act of 1976 and the Alaska Natural Gas Pipeline Act to an AGIA project (Work Order No. 25-LS1715)

**TO:** Senator Charlie Huggins  
Chair of the Senate Special Committee on Energy  
Attn: Sharon Long

**FROM:**   
Donald M. Bullock Jr.  
Legislative Counsel

You want to know how the Alaska Natural Gas Transportation Act of 1976<sup>1</sup> (ANGTA) and the Alaska Natural Gas Pipeline Act<sup>2</sup> (ANGPA) relate to a project under the Alaska Gasline Inducement Act (AGIA) (AS 43.90).

ANGPA did not displace ANGTA. 15 U.S.C. 720h,<sup>3</sup> enacted as part of ANGPA, clarifies ANGTA status and authorities. In particular, 15 U.S.C. 720(a) provides that nothing in

---

<sup>1</sup> Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719 et seq.

<sup>2</sup> Alaska Natural Gas Pipeline Act, 15 U.S.C. 720 et seq.

<sup>3</sup> 15 U.S.C. 720h. **Clarification of ANGTA status and authorities**

(a) Savings clause. Nothing in this division [15 USCS §§ 720 et seq.] affects--

(1) any decision, certificate, permit, right-of-way, lease, or other authorization issued under section 9 of the Alaska Natural Gas Transportation Act of 1976 (15 U.S.C. 719g); or

(2) any Presidential finding or waiver issued in accordance with that Act.

(b) Clarification of authority to amend terms and conditions to meet current project requirements. Any Federal agency responsible for granting or issuing any certificate, permit, right-of-way, lease, or other authorization under section 9 of the Alaska Natural Gas Transportation Act of 1976 (15 U.S.C. 719g) may add to, amend, or rescind any term or condition included in the certificate, permit, right-of-way, lease, or other authorization to meet current project requirements (including the physical

ANGPA "affects any decision, certificate, permit, right-of-way, lease or other authorization under sec. 9 of [ANGTA]." Both acts were intended to encourage and expedite the construction of a natural gas pipeline to transport natural gas from the State's North Slope. AGIA is consistent with the purposes and intent of ANGTA and ANGPA and an AGIA project can benefit from the facilitating provisions of those federal acts.

### ANGTA

ANGTA was enacted in 1976. Congress described the purpose of the Act as providing the means "for making a sound decision as to the selection of a transportation system for delivery of Alaska natural gas to the contiguous States for construction and initial operation by providing for the participation of the President and the Congress in the selection process."<sup>4</sup> ANGTA required the President to issue a decision before September 1, 1977, "as to whether a transportation system for delivery of Alaska natural gas should be approved under [ANGTA]."<sup>5</sup> On September 22, 1977, President Jimmy Carter forwarded to Congress his decision to select the Alcan project, which follows the Alaska Highway. Congress approved the president's selection on November 2, 1977.<sup>6</sup> The Alcan project was developed by the Alaska Northwest Natural Gas Transportation Company (ANNGTC). As of February 5, 2001, the only remaining partners of ANNGTC were Foothills Pipe Lines Ltd. and TransCanada PipeLines Ltd.<sup>7</sup> The Alaska Highway Project was demobilized in the early 1980's because natural gas demand was

---

design, facilities, and tariff specifications), if the addition, amendment, or rescission--

(1) would not compel any change in the basic nature and general route of the Alaska natural gas transportation system as designated and described in section 2 of the President's decision; or

(2) would not otherwise prevent or impair in any significant respect the expeditious construction and initial operation of the Alaska natural gas transportation system.

(c) Updated environmental reviews. The Secretary shall require the sponsor of the Alaska natural gas transportation system to submit such updated environmental data, reports, permits, and impact analyses as the Secretary determines are necessary to develop detailed terms, conditions, and compliance plans required by section 5 of the President's decision.

<sup>4</sup> 15 U.S.C. 719(a).

<sup>5</sup> 15 U.S.C. 719e(a). The president was given authority to delay the issuance of the decision for up to 90 days if certain conditions were met.

<sup>6</sup> H.R.J. 621, Public Law No. 95-158, 93 Stat. 1268, 95th Cong. 1st Sess. (1977).

<sup>7</sup> Presentation by John Ellwood, Vice President, Engineering and Operations for Foothills Pipe Lines Ltd., before the Alaska State Senate Resources Committee (Feb. 5, 2001).

not increasing as anticipated, but ANNGTC continued to hold and maintain federal right-of-way grants and other federal certificates and permits, at least through February 2001.<sup>8</sup>

The route for the pipeline project selected under ANGTA appears to be substantially similar to the route offered in the AGIA project that has been recommended by the commissioner of revenue and the commissioner of natural resources. Other than the continuation of any rights-of-way, certificates, or permits issued pursuant to the selection of the project under ANGTA, much of the Act does not appear to be applicable to the project proposed under AGIA.<sup>9</sup>

### ANGPA

ANGPA became law on October 13, 2004, and is applicable to the project proposed under AGIA. For the purposes of ANGPA, "Alaska natural gas" means "natural gas derived from the area of the State of Alaska lying north of 64 degrees north latitude," and defines "Alaska natural gas transportation project" to mean, "any natural gas pipeline system that carries Alaska natural gas to the border between Alaska and Canada . . . that is authorized under [ANGTA] or [15 U.S.C. 720(a)]." 15 U.S.C. 720(a) authorizes the Federal Energy Regulatory Commission (FERC) to issue a certificate of public convenience and necessity (CPCN) in accordance with 15 U.S.C. 717f(c) (Natural Gas Act) for the construction and operation of an Alaska natural gas transportation project other than that selected under ANGTA. In other words, the exclusivity for the project selected under ANGTA in 1977 no longer applies and FERC may issue a CPCN to either the original project or a new project, such as that proposed under AGIA.

ANGPA imposes limits on the source of the gas; gas for the project must be produced north of 64 degrees north latitude, *supra*. The route the project must follow is also restricted; the project must enter Canada south of 68 degrees north latitude and may not traverse land beneath navigable waters (as defined in sec. 2 of the Submerged Lands Act) in the vicinity of the Beaufort Sea.<sup>10</sup> The project proposed under AGIA avoids the prohibited routes.

ANGPA required FERC to issue regulations governing the conduct of open seasons for Alaska natural gas transportation projects,<sup>11</sup> which FERC did in 2005.<sup>12</sup> The regulations governing the conduct of the open season are applicable to the AGIA project.

---

<sup>8</sup> *Ibid.*

<sup>9</sup> As discussed below, 15 U.S.C. 720h, enacted as part of ANGPA, provides for the continuation of decisions, certificates, permits, rights-of-way, leases, and other authorizations issued under 15 U.S.C. 719g of ANGTA, as well as any Presidential finding or waiver issued under the earlier Act.

<sup>10</sup> 15 U.S.C. 720a(d).

<sup>11</sup> 15 U.S.C. 720a(c).

Alaska-in-State gas needs are addressed in ANGPA. 15 U.S.C. 720a(g) requires the holder of the CPCN to demonstrate that the holder has conducted a study of Alaska in-State needs, including tie-in points for in-State access. AS 43.90.130(1) requires a description of receipt and delivery points in the State and AS 43.90.130(12) requires the AGIA licensee to provide a minimum of five delivery points in the State. Regardless of the result of the study, AGIA requires delivery points and access points.

15 U.S.C. 720a(h) authorizes the State to request reasonable access to the project for the transportation of royalty gas for in-State consumption and provides that the rates of shippers of subscribed capacity on the project shall not be increased as a result of the State being granted access. This provision could be the basis for ensuring an in-State supply of natural gas in the form of the State's royalty gas. AGIA requires a commitment to offer firm transportation service to delivery points in this State as part of the tariff and offer distance-sensitive rates regardless of whether the gas is royalty gas or not.<sup>13</sup>

15 U.S.C. 720b designates FERC as the lead agency for purposes of complying with the National Environmental Policy Act of 1969 and provides for expediting the environmental impact statement. This requirement will expedite the environmental impact review of an AGIA project.

15 U.S.C. 720c authorizes FERC to order the expansion of the pipeline project if expansion is found to be required "by the present and future public convenience and necessity." AS 43.90.130(5) - (7) require the AGIA licensee to evaluate the market demand for increased capacity, commit to expand the proposed project in reasonable engineering increments and on commercially reasonable terms, and propose rolled-in rates or a combination of incremental and rolled-in rates for the expanded capacity.

15 U.S.C. 720d establishes the Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects. The coordinator -- former State Senator Drue Pearce -- will be available to expedite and coordinate reviews by federal agencies that are required by the AGIA project. The federal position is similar to the position of Alaska Gasline

---

<sup>12</sup> The regulations appear at 18 CFR Part 157 and were issued February 9, 2005. Order No. 2005, 110 FERC 61,095 (Feb. 9, 2005). An Order clarifying the original order was issued June 1, 2005. Order No. 2005-A, 111j FERC 61,332 (June 1, 2005). Exxon Mobil Corp. sought pre-enforcement review of two regulations that asserted FERC's authority to condition a CPCN on the project sponsor's willingness to increase the capacity or expandability of the project on the basis that that condition was inconsistent with the Natural Gas Act and ANGPA. The United States Court of Appeals for the D.C. Circuit denied the permission. *Exxon Mobil Corp. v. Federal Energy Regulatory Commission*, 378 U.S. App. D.C. 205, 501 F.3d 204 (2007).

<sup>13</sup> AS 43.90.130(13).

Inducement Act coordinator established by AS 43.90.250 to expedite State action required for the AGIA project.

15 U.S.C. 720e provides for expedited judicial review to determine the validity of any final order or action of a federal agency under ANGPA, the constitutionality of a provision of ANGPA, or the adequacy of any federal environmental impact statement. This provision will expedite the judicial review of federal action regarding the AGIA project and is similar to the short period for challenging the constitutionality of the license or AGIA provided in AS 43.90.420. Sec. 7 of AGIA is also similar in its expression of the intent of the legislature that Alaska courts expedite the consideration of a "case related to the development and construction of a natural gas pipeline under this Act or to the commitment of a shipper to acquire firm transportation capacity during the first binding open season for a project developed under [AGIA], expedite the resolution of the case by giving the case priority over all other civil cases to the extent permitted under the Alaska Rules of Court."

15 U.S.C. 720f addresses State jurisdiction over in-State delivery of natural gas. The section treats a facility receiving natural gas from an Alaska natural gas transportation project to be deemed a local distribution facility and not subject to FERC jurisdiction, provides that ANGPA does not preclude a future in-State gas pipeline, and requires FERC to establish rates for the transportation of natural gas on any Alaska natural gas transportation project and consult with the State regarding rates applicable to natural gas transported on and delivered from the project for use in the State. AGIA anticipates the potential jurisdiction of the Regulatory Commission of Alaska over the AGIA project in AS 43.90.110, 43.90.130, 43.90.200, and 43.90.900.

15 U.S.C. 720g required the Secretary of the Department of Energy to conduct a study of alternative approaches to the construction and operation of an Alaska natural gas transportation project if an application for the issuance of a CPCN or amended CPCN was not received within the 18 months following October 13, 2004.<sup>14</sup> AGIA offers another approach for the inducement of a gas pipeline project.

15 U.S.C. 720h clarifies ANGTA status and authorities under ANGPA.<sup>15</sup> ANGTA does not affect "any decision, certificate, permit, right-of-way, lease, or other authorization

---

<sup>14</sup> October 13, 2004 was the date ANGPA was enacted. The Department of Energy commenced an Alternative Means of Construction Study. Report Submitted to the United States Congress by the Federal Energy Regulatory Commission, *Second Report to Congress on Progress Made in Licensing and Constructing the Alaska Natural Gas Pipeline* (July 10, 2006). The report is published on the Internet at <http://www.ferc.gov/legal/staff-reports/angta-second.pdf> (accessed June 9, 2008).

<sup>15</sup> The text of 15 U.S.C. 720h is set out in footnote 3, *supra*.

issued under section 9 of the ANGTA,"<sup>16</sup> but allows a federal agency with jurisdiction to add to, amend, or rescind any term or condition to meet current project requirements so long as the change "would not compel any change in the basic nature and general route of the [pipeline project selected under ANGTA]" and "would not otherwise prevent or impair in any significant respect the expeditious construction and initial operation of the Alaska natural gas transportation system."<sup>17</sup> To the extent the AGIA licensee has the benefit of a "certificate, permit, right-of-way, lease, or other authorization" previously granted under ANGTA, that benefit can continue under a project subject to ANGPA and AGIA.

15 U.S.C. 720i expresses the sense of Congress that the gas pipeline "would provide significant economic benefits to the United States and Canada." To maximize those benefits, the provision directs the project sponsors to use steel manufactured in North America in the project and to "negotiate a project labor agreement to expedite construction of the pipeline." AGIA does not address the source of steel, but AS 43.90.130(17) does require the licensee to commit "to negotiate, before construction, a project labor agreement to the maximum extent permitted by law."

15 U.S.C. 720j is another section expressing the sense of Congress. The provision encourages the sponsors of a gas pipeline project "to maximize the participation of small business concerns in contracts and subcontracts awarded in carrying out the project."<sup>18</sup> Although AGIA does not directly require the use of small businesses in conjunction with the development of the pipeline, AS 43.90.130(15) requires a commitment to hire Alaska residents and contract with businesses in the state "to the maximum extent permitted by law."

15 U.S.C. 720k requires the Secretary of Labor to make grants to recruit and train adult and dislocated workers in Alaska in the skills required to construct and operate the gas pipeline, and for the construction of training facilities, specifically in Fairbanks, to support a pipeline training program. For the grants to be issued, the governor must request the grant funds and must certify that construction will commence within two years after the date of the certification. Also, the Secretary of Energy must concur with the governor's certification. The section also authorizes the appropriation of \$20,000,000 to carry out the requirements of the section, of which not more than 15 percent of the amount may be for the construction of the training facility. AS 43.90.470 of AGIA requires the commissioner of labor to "develop a job training program that will provide training for Alaskans in gas pipeline project management, construction, operations, maintenance, and other gas pipeline-related positions." There may be grants available

---

<sup>16</sup> 15 U.S.C. 720h(a).

<sup>17</sup> 15 U.S.C. 720h(b).

<sup>18</sup> 15 U.S.C. 720j(b)(2).

under 15 U.S.C. 720k to help fund the job training program developed by the commissioner.

15 U.S.C. 720i does not directly impact AGIA. The ANGPA section expresses the sense of Congress that the demand for natural gas will increase dramatically during the next several decades, that both Alaska's gas pipeline and a pipeline project to transport natural gas from the Mackenzie Delta will be necessary to meet the demand, that both U.S. and Canadian officials should work together to move both projects forward, and that natural gas from Alaska will not displace or reduce the commercial viability of natural gas produced from the Mackenzie Delta or the lower 48.

15 U.S.C. 720m expresses the sense of Congress that Alaskan Native Regional Corporations, Alaskan companies, and individual Alaskans should have the opportunity to own shares of the gas pipeline and that the sponsors should negotiate with any willing Alaska person that desires to be involved in the project. As noted earlier, AS 43.90.130(15) requires a commitment to use Alaska workers and to contract with Alaska businesses. Ownership by Alaskans is not addressed in AGIA, but was discussed when AGIA was considered by the legislature before enactment.

15 U.S.C. 720n provides for a federal loan guarantee for a holder of a CPCN or a person determined to be qualified to construct and operate a liquefied natural gas project to ship liquefied natural gas from Southcentral Alaska to West Coast States.<sup>19</sup> The loan guarantee is also available to the owner of the Canadian portion of a qualified infrastructure project.<sup>20</sup> The authority to issue the loan guarantees expires two years after the final CPCN, including any Canadian CPCN, is issued.<sup>21</sup> The U.S. CPCN may be an initial CPCN issued under ANGPA or an amended CPCN initially issued under ANGTA.<sup>22</sup> The loan guarantee may be used only by the project chose as the qualified project by FERC,<sup>23</sup> and imposes other eligibility requirements. Except with regard to a liquified natural gas project, the total amount of all guarantees may not exceed 80 percent of the total capital costs, including interest, or a total principal amount of \$18,000,000,000 as adjusted for inflation after October 13, 2004. The guarantee for a qualified liquefied natural gas project may not exceed a principal amount of \$2,000,000,000.<sup>24</sup> The section identifies eligible lenders and provides for other terms and fees connected with the loan guarantees. An AGIA licensee may benefit from the

---

<sup>19</sup> 15 U.S.C. 720n(a)(1).

<sup>20</sup> 15 U.S.C. 720n(a)(2).

<sup>21</sup> 15 U.S.C. 720n(a)(3).

<sup>22</sup> 15 U.S.C. 720n(b)(1).

<sup>23</sup> 15 U.S.C. 720n(b)(4).

<sup>24</sup> 15j U.S.C. 720n(c). October 13, 2004 is the date of the enactment of ANGPA.

Senator Charlie Huggins

June 10, 2008

Page 8

guarantees, provided the licensee and other project owners qualify under the terms and conditions of 15 U.S.C. 720n.

**Conclusion**

Although the above is a fairly cursory review of ANGTA and ANGPA and the interrelationship between AGIA and two federal Acts, all three Acts are complementary. AGIA seems to have been modeled after and to be consistent with many of the terms of the two Acts. An AGIA licensee that also meets the conditions of the federal Acts will benefit from the loan guarantees and the intent of the federal Acts to expedite the construction of an Alaska natural gas pipeline.

I urge you to discuss the interaction of the two federal Acts with the consultants that have been retained by the legislature and executive branch to further AGIA.

If I may be of further assistance, please advise.

DMB:ljw  
08-257.ljw