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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

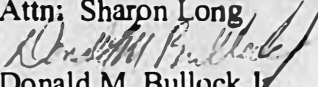
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

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)¹ 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.² 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 offered³ and the requirements and obligations an applicant must satisfy or agree to in order to qualify for a license.⁴

¹ AGIA is codified at AS 43.90.100 - 43.90.990.

² See AS 43.90.180(a).

³ AS 43.90.110.

⁴ AS 43.90.130.

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

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.⁶ If the legislature approves the issuance of the license, the commissioners are required to issue the license as soon as practicable.⁷

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, 2008,⁸ 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.⁹

⁵ AS 43.90.300 - 43.90.330.

⁶ 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).

⁷ AS 43.90.190(b).

⁸ 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.

⁹ 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.¹⁰

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:¹¹

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.")

¹⁰ 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.

¹¹ 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. (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:¹²

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.

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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.¹³ 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. 1, 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,¹⁴ 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.¹⁵

¹³ 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).

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[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

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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."

170 P.3d 183, 219 (Alaska 2007) (emphasis added) (citations omitted).

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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
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Q 4 Don

Don, pg 3. June 7, 2008,
"Chadha v Immigration..."

Does this mean AGIA is
unconstitutional? or is
it that we are merely
showing support for a license
w/ subsequently ~~blames~~ ^{upon} signing a contract

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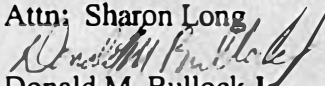
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The effect of an amendment to AGIA.

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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.

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