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We look forward to working with you on this issue.

Sincerely,

Jerry Gallagher
Manager, Government Relations

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

"An Act clarifying policies and procedures for the investigation of abandonment or discontinuation of service under the Pipeline Act; and providing for an effective date."

Sec #1

* AS 42.06.140, General Powers and Duties, subsection (a)(8) is amended to read:

(8) shall require permits for the construction, enlargement in size or operating capacity, extension, connection and interconnection, **or** operation [OR ABANDONMENT] of any oil or gas pipeline facility or facilities, subject to necessary and reasonable terms, conditions and limitations;

Sec #4

* AS 42.06.290, Abandonment, subsection(a) is amended to read:

Abandonment **or discontinuance of service.** A pipeline carrier may not [ABANDON OR PERMANENTLY DISCONTINUE USE OF ALL OR ANY PORTION OF A PIPELINE OR] abandon or discontinue any service rendered by means of a pipeline that is the subject of a certificate of convenience and necessity, without the permission and approval of the commission, after due notice and hearing, and a finding by the commission that continued service is not required by public convenience and necessity. Any interested person may file with the commission a protest or memorandum in opposition to or in support of discontinuance or abandonment. The commission may authorize temporary suspension of a service or part of a service.

* **Effective date.** Notwithstanding any other law, the amendments set forth in this bill shall be effective upon enactment; provided, however, that the amendments shall apply to all matters currently pending before the commission involving pipelines or pipeline carriers, regardless of when such matters were initiated.

B.P.

New Text Underlined [DELETED TEXT BRACKETED]

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

"An Act modifying the policies and procedures for the investigation of rates under the Pipeline Act; and providing for effective dates."

Sec. #1

* AS 42.06.140, General Powers and Duties, subsection (a) is amended to read:

(a) The commission
(1) shall regulate [PIPELINES AND PIPELINE CARRIERS IN THE STATE] **the provision of intrastate pipeline transportation services within the state, including rates, classifications, regulations, practices, and conditions of service but only to the extent they apply to the delivery of intrastate transportation services;**
(2) may investigate upon complaint or its own motion, the rates, classifications, rules, regulations, prices, services, **and** practices[,AND FACILITIES] of pipeline carriers [AND THE PERFORMANCE OF OBLIGATIONS UNDER AND COMPLIANCE WITH THE TERMS OF LEASES ISSUED BY THE STATE];
(3) may make, prescribe, or require just, fair, and reasonable rates, classifications, regulations, practices, service[S], [AND FACILITIES] for pipeline carriers;
(4) may require pipeline carriers and affiliated interests to file with the commission reports and other information and data required or permitted to be required by other provisions of this chapter;
(5) shall adopt regulations that are necessary and proper to the performance of its duties under this chapter, including regulations governing practices and procedures of the commission, the regulations may not be inconsistent with state law;
(6) shall during normal business hours have access to and may designate any of its employees, agents, or consultants to inspect and examine the accounts, financial and property records, books, maps, inventories, appraisals, valuations, and related reports kept by a pipeline carrier, or kept for it by others, that directly affect the interest of the state and directly relate to pipeline located in the state;
(7) may initiate, intervene in, and appear personally or by counsel and offer evidence in and participate in, any proceedings involving a pipeline carrier, and affecting the interests of the state, before any officer, department, board, commission, or court of this state;
(8) shall require permits for the construction, enlargement in size or operating capacity, extension, connection and interconnection, operation or

abandonment of any oil or gas pipeline facility or facilities, subject to necessary and reasonable terms, conditions and limitations;
(9) may prescribe the system of accounts and regulate the service of an oil or gas pipeline facility;
(10) shall provide all reasonable assistance to the Department of Law in intervening in, offering evidence in, and participating in proceedings involving a pipeline carrier or affiliated interest and affecting the interests of the state, before an officer, department, board, commission, or court of another state of the United States.

Sec. #3

* AS 42.06.245, Federally Regulated Carriers, is amended to read:

The requirements of this chapter pertaining to permits and certificates of public convenience and necessity do not apply to the construction of a pipeline facility exclusively subject to federal jurisdiction or to the interstate portion of the business of a pipeline or pipeline carrier [EXCLUSIVELY] subject to federal jurisdiction**, including rates, tariffs, charges, classification, rules, regulations, terms, and conditions pertaining to the interstate portion of the business subject to such federal jurisdiction** . However, the requirements of this chapter for permits and certificates of public convenience and necessity do apply to [ALL] the intrastate portion of the business of a pipeline or pipeline carrier subject to federal jurisdiction [WHENEVER IT ENGAGES] **to the extent the pipeline or pipeline carrier is engaged** in intrastate commerce, **including rates, tariffs, charges, classification, rules, regulations, terms, and conditions pertaining solely to the intrastate portion of the business. The commission may not consider any revenue collected on interstate transportation when evaluating intrastate rates or tariffs.** [HOWEVER, NOTHING LIMITS THE POWERS OF THE COMMISSION SET OUT IN THIS CHAPTER EXCEPT TO THE EXTENT THEY ARE PREEMPTED BY FEDERAL LAW].

Sec. #2

* AS 42.06.230, Jurisdiction of the Commission, is amended by adding a new subsection (c) to read:

(c) Notwithstanding any other provision of this Chapter, the commission shall have no jurisdiction over the performance by a pipeline carrier of its obligations with respect to the dismantlement, removal and restoration of the pipeline facility or any part thereof, nor shall the commission have any jurisdiction over any amount collected or held by any pipeline carrier for the performance of such dismantlement, removal, and restoration for the pipeline system except amounts included in such pipeline carrier's intrastate rates.

Sec #5 (This is dropped in CSHB 277 (O+G))

* AS 42.06.370, Rates to be Just and Reasonable, is amended by adding a new subsection to read:

(d) **Rates agreed to, or rates set in conformity with a rate methodology agreed to, by a pipeline carrier, or by any two or more pipeline carriers jointly, in a settlement agreement with the State of Alaska, shall be considered to be in the public interest and shall conclusively be deemed just and reasonable under subsection (a) and not unduly discriminatory under AS 42.06.380(a) during the term of such settlement agreement. Notwithstanding the foregoing sentence, the commission shall not be barred from hearing a protest or petition by the State of Alaska regarding an intrastate rate charged by a pipeline carrier, or by any two or more pipeline carriers jointly, to the extent that such protest or petition is based upon an allegation that such rate does not conform to the terms of a settlement agreement entered into by such carrier or carriers and the State of Alaska with respect to such intrastate rate. In any such proceeding, the commission shall be limited to determining whether the challenged intrastate rate conforms to the agreed-upon rate or rate methodology set forth in such settlement agreement.**

New Sec #6 after renumber in CSHB 277 (O+G)

* AS 42.06.410, Power of the Commission to Fix Rates, subsection (a) is amended to read:

(a) When the commission, after an investigation and hearing, finds that a rate demanded, observed, charged, or collected by a pipeline carrier for a service, subject to the jurisdiction of the commission, or that a classification, rule, regulation, practice, or contract affecting the rate, is unjust, unreasonable, unduly discriminatory or preferential, the commission shall determine a just and reasonable rate, classification, rule, regulations, practice, or contract to be **thereafter** observed or allowed **in the future** and shall establish it by order.

New Sec #5 after renumbering in CSHB 277(O+G)

* AS 42.06.400, Suspension of Tariff Filing, subsection (b) is amended to read:

(b) An order suspending a tariff filing may be vacated if, after investigation, the commission finds that it is in all respects proper. ..... The amount, if any, by which the permanent tariff exceeds the temporary tariff shall be paid by the shipper to the carrier, or, if the temporary tariff exceeds the permanent tariff, the difference shall be paid by the carrier to the shipper, and in either event, **provided such funds were not placed in escrow as provided by this subsection,** such payment shall be made with interest calculated on the balance due at the end of each calendar month at the [LEGAL RATE] **rate of interest specified in AS 09.30.070 (a)** [, AS DEFINED IN as 45.45.010(A)]. The commission may allow the shipper, at the shipper's expense, to substitute a bond or letter of credit in place of the escrow requirement.

* **Effective date.** Notwithstanding any other law, the amendments set forth in this bill shall be effective upon enactment; provided, however, that the amendments shall apply to all matters currently pending before the commission involving pipelines or pipeline carriers, regardless of when such matters were initiated; and provided further that the amendment to 42.06.370 shall take effect only if Executive Order No. 111 takes effect; and the amendment to AS 42.06.400 (b) shall apply retroactively as of August 7, 1997, the Effective Date of the 1997 amendment to AS 09.30.070 (a).

Rationale for Five Amendments to the Alaska Pipeline Act

Amendment 1: Clarify that the jurisdiction of the RCA is limited to intrastate transportation;

- Corrects "jurisdiction creep". Helps to provide absolute clarity that RCA jurisdiction is limited to intra-state issues. Lack of clarity has been illustrated in the RCA ruling of March 6, 2003, in which the RCA are attempting to exercise jurisdiction over inter-state DR&R matters.
- The FERC has jurisdiction over all inter-state matters, including those pertaining to DR&R.

Amendment 2: Eliminate the RCA's jurisdiction over State Right-of-Way leases and clarify their authority over dismantlement, removal and restoration;

- The DNR has jurisdiction over State ROW leases as land owner. The DNR serves to protect the public interests, and has the staff and skills to do so.
- This is yet another illustration of RCA "jurisdictional creep".

Amendment 3: Ensures RCA support of rate methodologies agreed to in settlement agreements with the State;

- We must ensure that the RCA (or any other agency) cannot undo what has been agreed with the State of Alaska. The State represents the best interests of the people, and to allow the RCA to undo such representation is bad public policy.
- This amendment only applies to settlement agreements with the State.
- It is not in the State's interest to agree to anything that is not "just and reasonable".
- Companies need certainty about rules and agreements in order to have the confidence they need to invest.
- The RCA argues, "We did not overturn TSM with Order 151". The RCA says that TSM methodology provided maximum rates, and that Order 151 simply says that the actual rates charged were too high. Had the TAPS carriers known the position the RCA is now taking, it is unlikely they would have agreed to the TSM deal.

Amendment 4: Clarify the interest rate applicable to RCA ordered refunds such that it is the same rate as is applicable to other Alaska decrees for the payment of money. .

- In 1997, the legislature provided that decrees for the payment of money are to bear interest at a rate which floats with market conditions but failed to clearly indicate that the floating rate is applicable to the APA.
- The intent of this amendment is to ensure that the interest rate applicable to the APA is the same as is applicable in other similar contexts in Alaska law and not the maximum lawful rate of 10.5%. (Note that a 10.5% return is likely better than anything else held by Williams/Tesoro)
- This would mean that refunds due the carriers from shippers would also be subject to the floating rate.

Amendment 5: Clarify that the RCA has jurisdiction over the intra-state services rendered by common carrier pipelines to their customers, and that other regulatory bodies have jurisdiction over the physical components of a pipeline system.

- The discontinuance or abandonment of pipeline service to shippers is the appropriate regulatory concern of the RCA. The abandonment or discontinuance of use of the physical components of a pipeline system is the regulatory concern of other agencies, in particular, the Department of Natural Resources through the State Pipeline Coordinator's Office (DNR).
- The DNR oversees compliance with the terms and conditions of pipeline right-of-way leases. This legislation will make it clear that the RCA regulates the discontinuance of service, but not the discontinuance of use of the physical components of a pipeline system.
- This amendment will facilitate the efficient implementation of TAPS Strategic Re-configuration, which will lower costs and benefit the carriers, the shippers, and the State.
- In addition, there are as many as 13 state and federal agencies that have a regulatory role concerning the discontinuation of use of certain components of TAPS.
- Thus, the safety, operational and environmental aspects of the proposed strategic reconfiguration of TAPS are fully subject to regulatory oversight by appropriate state and federal agencies. Those agencies are staffed with the appropriate expertise to fulfill their respective regulatory roles.
- RCA regulation of the discontinuance of use of some of the physical components of TAPS is therefore unnecessary.
- This legislation will eliminate duplicative and potentially inconsistent regulation of the strategic reconfiguration of TAPS.

TAPS, TARIFFS, AND WHY CHANGES TO THE PIPELINE ACT ARE NEEDED

Mr. Chairman, members of the Committee, thank you for this opportunity to come before you. My name is Randal Buckendorf. I am an attorney in Anchorage for ConocoPhillips. In that capacity I handle our environmental legal work and our pipelines legal work.

In the past I have presented testimony to both the House and Senate on the need for environmental regulatory certainty. In presenting that testimony and in answering the many questions that followed, the basic fundamental point was that the regulated public must know:

(1) How it will be regulated;

(2) The requirements and standards it will be held accountable to; and

(3) Most importantly that those requirements will be implemented and enforced by the regulatory agency in a consistent manner within the scope of its jurisdiction.

These very same principles apply to the regulation of pipelines – the other half of my legal work; and, as I will explain in greater detail below, none of them can currently be said to exist with respect to the regulation of pipelines by the Regulatory Commission of Alaska. Furthermore, the absence of these basic regulatory principles has created such uncertainty that it has cast a cloud over ConocoPhillips' business in Alaska.

With that in mind, I will try and focus my limited time in front of you to three points and then make myself available for any questions you may have. I have also prepared a detailed briefing notebook for each of you that contains quite a lot of additional information and material.

First, we have prepared an overview of TAPS itself, the history behind the TAPS Settlement Agreement, and both an overview and detailed discussion of the many years of litigation.

Second, although we are neither asking you to overturn the recent RCA decision on TAPS rates nor to legislatively validate the TAPS settlement agreement itself, I

would like to spend a few minutes to 'debunk' some of the recent misstatements in the press and elsewhere regarding TAPS tariffs, the TAPS Settlement Agreement, and why it has and will continue to work exactly like the State and the U.S. Justice Department envisioned it would – as a fair and reasonable settlement that would encourage economically efficient exploration of north slope petroleum resources.

Finally, I would like to spend a few minutes to discuss the uncertainty that currently exists and why legislative changes should be made to the pipeline act in AS 42.06 that will:

- Clarify that the jurisdiction of the RCA over rates is limited to intrastate tariffs

- Eliminate RCA jurisdiction over state right-of-way leases and clarify its authority over dismantlement, removal, and restoration

- Acknowledge that the State acts in the best interest of the public under the pipeline act, a fact recently made evident by Executive Order No. 111, and ensure the validity of future settlement agreements

- Clarify that the Legislature intended the 1997 interest rate amendments to apply to the pipeline

Testimony before the House Oil & Gas Committee
on H.B. 277
Richard A. Fineberg, P.O. Box 416, Ester, Alaska 99725
April 22, 2003

Thank you for the opportunity to testify on H.B. 277. I believe this proposal to further emasculate the Regulatory Commission of Alaska (RCA) has enormous potential to do harm on two fronts. First, this bill strikes a sharp blow against the healthy competitive environment that is essential to continued oil development in this state by eviscerating the commission's authority to deal constructively with pipeline tariffs in a variety of significant ways. At the same time, this bill adversely affects the State Treasury by preventing the commission from promoting just and reasonable pipeline tariffs.

This is special interest legislation, pure and simple. The special interest is that of the three major owners of the Trans-Alaska Pipeline System (TAPS), who own more than 90 percent of TAPS and a similar percentage of the North Slope production that they ship through the pipeline they control. Over the last three decades I have observed the harmful economic and environmental effects of this unhealthy synergy from a variety of perspectives -- as a reporter during pipeline construction (1974-1978), as a senior advisor to the Governor on oil and gas policy (1987-1989) again as a reporter (1989-90) and as a consultant (1990 – present). Between June 2000 and May 2001, I served as the Staff Expert Witness for the Public Advocacy Section of the RCA in the first phase of its TAPS rate case, which I will discuss below. Based on this experience, I believe the RCA, its decision in the TAPS case and its continued efforts are the targets of the carefully aimed bullets fired by HB 277, to the detriment of the public interest.[1]

Pipeline tariff issues require focused and careful analysis. That function is performed by the RCA under the Alaska Pipeline Act (AS 42.06). On November 27, 2002, the RCA issued a thorough and well-crafted order on Trans-Alaska Pipeline System (TAPS) tariffs.[2] That order authoritatively documents the enormous profitability

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[1] My most recent assessment of the enormous profits the TAPS Owners realize from the tariffs filed under TSM – along with a conservative reckoning of the separate benefits secured through the dismantling provision – can be found in *The Emperor's New Hose: How Big Oil Gets Rich Gambling on Alaska's Environment* (Alaska Forum for Environmental Responsibility, June 2002), Chapter 5 (on line at www.alaskaforum.org).

[2] Regulatory Commission of Alaska, *Order Rejecting 1997, 1998, 1999 and 2000 Filed TAPS Rates; Setting Just and Reasonable Rates; Requiring Refunds and Filings; and Outlining Phase II Issues*, Docket P-97-4, Order #151 Nov. 27, 2002 (on-line at *www.state.ak.us/rca*). The order held that TAPS tariffs between 1997 and 2000 were 57% above the "just and reasonable" levels mandated by AS 42.06 and that between 1977 and 1996 the same tariff methodology, applied linewide, resulted in tariffs that exceeded just and reasonable levels by $9.9 billion. Although the 1977-96 tariffs were not at issue in the RCA hearing, historical tariffs had to be calculated to determine the correct tariffs for the years at issue. These central conclusions have two significant effects:

of TAPS under the 1985 TAPS Settlement Methodology (TSM). I think it is fair characterize this order as historical in its significance. Three indications of this order's importance to the state are:

➔ (1) The statement of the Department of Natural Resources Division of Oil and Gas that "[e]xcessive tariffs create barrier to entry for all oil and gas companies not owning an interest in TAPS;"[3]

➔ (2) The listing of lower TAPS tariffs by 17 key industry participants and observers as the top priority for 2003 (with streamlined permitting) and "one of the most important incentives the state could offer;"[4] and

➔ (3) The Alaska Permanent Fund Board of Trustees decision to investigate "all maintenance and operational practices, including tariff and facility pricing," that could limit development of state oil leases.[5] Each of these statements referenced RCA's November 27, 2002 order.

The Department of Natural Resources has estimated that reduced tariffs on TAPS – if applied line-wide – would increase state revenues by $110 million per year. At present, the TAPS Owners are pocketing that excessive revenue.[6] Although RCA tariffs govern only eight percent of oil shipped through TAPS (the portion going to in-state refineries), the RCA order indirectly calls into question the interstate tariffs governed by the Federal Energy Regulatory Commission (FERC) for two reasons: (1) FERC approved a virtually identical, ad hoc formula settlement in 1985; and (2) as the RCA put it, the commission order marks "the first time in more than 20 years of TAPS operations that a regulatory agency has reviewed TAPS rates for consistency with statutory standards."[7] Clearly, the RCA decision – 168 pages in length, with approximately 300 pages of endnotes and worksheets – renders the 1985 settlement more vulnerable to challenge at FERC. Perhaps this is one reason the TAPS Owners have filed every

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(1) Because transportation charges are subtracted from the market price to determine the basis for assessing royalty and severance taxes, the state loses approximately $0.21 to $0.23 for every dollar increase in the TAPS tariff (and vice-versa). By this reckoning, between 1977 and 1996 the overcharges allowed under the TAPS settlement methodology (TSM) cost the state $2.1 to $2.5 billion in revenue.

(2) Because an independent shipper pays TAPS tariffs out of pocket while a producer-shipper pays an affiliated company, excessive tariffs (plus the allowable profit on all charges) amount to a transfer payment rather than an out-of-pocket cost; benefits to TAPS owners are further compounded by tax treatment.

[3] Alaska Division of Oil and Gas, "Gas Line: Examples of the Cost of 'Fiscal Certainty'," Dec. 9, 2002 (briefing slide).

[4] "'Good news' wanted in 2003," *Petroleum News Alaska*, Jan. 19, 2003, p. 1.

[5] Sean Cockerham, "Oil lease probe sought – Permanent Fund: Corporation worries smaller companies are shut out, state is being shortchanged," *Anchorage Daily News*, Feb. 20, 2003 (on-line).

[6] Allen Baker, "State weighs pipeline fees – $110 Million: If rates are cut, Alaskans, small producers benefit," *Anchorage Daily News*, Dec. 31, 2002, p. A-1.

[7] Regulatory Commission of Alaska, "The Regulatory Commission of Alaska Rejects Rates for the 1997-2000 Intrastate Trans-Alaska Pipeline System, Sets Just and Reasonable Rates, and Requires Refunds and Filings by Carriers," Nov. 27, 2002 (press release; on-line).

imaginable legal challenge to the initial decision – both at the RCA and in court – in an effort to preserve their ill-gotten gains. Not surprisingly, their lobbyists have now shown up on your doorstep.

By way of background, it should be noted that the TSM was negotiated between the state, represented by the Department of Law, and the TAPS Owners.[8] In the years since the settlement, the Department of Law has steadfastly defended the settlement, relying on the agreement's "duty to defend" clause[9] to argue on behalf of the gains to the TAPS Owners conferred by defects in the complicated methodology and post-settlement changes in conditions.

The direct benefits of identifying and reducing excessive TAPS tariffs are quantified and defended in the RCA decision. But that decision also deferred – and served notice that the commission intends to deal with – another matter of enormous public concern and special interest to the TAPS Owners: The tariff provisions governing TAPS dismantling, removal and restoration (DR&R) were reserved for a "Phase II" proceeding. Recently, the RCA determined that the commission had broad jurisdiction over DR&R under state law, and that it would continue the proceeding to hear that issue.[10] The industry's accelerated or front-loaded collection and retention of approximately $1.6 billion in funds for the future dismantling of the pipeline is an undeserved windfall to the TAPS Owners of enormous proportions. The 1985 settlement delivered this windfall to the TAPS Owners at shipper and public expense. The financial benefits to the TAPS Owners and the policy consequences for the state were first quantified in 1986 by the Staff Expert Witness for the Alaska Public Utilities Commission, predecessor to the RCA.[11] Since then, DR&R problems have come to public attention at least four times; in every instance, the state administration has failed to remedy the problem, thereby continuing to penalize the state treasury and place the environment at potential risk.[12]

While the DR&R provision has major implications for public policy, a relatively minor aspect of the TAPS DR&R terms may provide the best illustration of the complicated nature of pipeline tariff issues -- and the potential for TAPS owners to profit from that complexity at state expense. TSM allows the TAPS owners to collect from

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[8] *Settlement Agreement between The State of Alaska and ARCO Pipe Line Co., BP Pipelines Inc., Exxon Pipeline Co., Mobil Alaska Pipeline Co., Union Alaska Pipeline Co. with Respect to the Trans Alaska Pipeline System*, June 28, 1985 (Federal Energy Regulatory Commission Docket OR 78-1), p. 1.

[9] *Settlement*, Section I-3.

[10] Regulatory Commission of Alaska, *Order Denying Indicated TAPS Carriers' Motion to Cancel Prehearing Conference and Ruling on DR&R Question*, Docket P-97-4, Order #157, March 6, 2003 (on-line at *www.state.ak.us/rca*).

[11] *Prefiled Testimony of Rudolph L. Bertschi* (Alaska Public Utilities Commission Docket No. P-86-2), December 17, 1986, pp. 63-70.

[12] For a summary of DR&R issues in the context of the TAPS tariff, see Richard A. Fineberg, *The Emperor's New Hose: How Big Oil Gets Rich Gambling with Alaska's Environment* (Alaska Forum for Environmental Responsibility, June 2002, Chapter 5 (on-line at *www.alaskaforum.org*).

shippers an income tax surcharge on all DR&R payments as part of the tariff. But instead of actually making those payments to the Internal Revenue Service (IRS), it is a matter of public record that the pipeline owners obtained a special ruling allowing annual deductions on DR&R income – long before that money is actually spent on dismantling. For the TAPS owner shipping its own oil, the unnecessary income tax collection is simply a transfer to from the company's production arm to its transportation subsidiary. But that phantom transportation cost penalizes non-owner shippers and reduces the production arm's royalty and severance tax basis, saving the company – and costing the state – an estimated $0.21 to $0.25 per dollar.[13] Two final notes on this subject: (1) In 2000 your colleagues tried – without success – to find out how much the state has lost over the years as a result of this scam.[14] (2) As mentioned above, this is only one of the several defects in the DR&R component of TSM – and by no means the most important.

The immediate, short-term fiscal consequences of the TAPS DR&R loophole described in the preceding paragraph are small compared to the long-term policy implications. One of the most egregious parts of HB 277 is the proposed statutory requirement that RCA support of rate methodologies agreed to in settlement agreements with the State. Over the years, the RCA and its predecessors have supported the use of a standard utility rate-making methodology for pipelines to ensure just and reasonable tariffs that promote robust competition. In my estimation, it would be an act of short-sighted blindness to overturn this important precedent. Note in this regard that TSM which HB 277 seeks to defend, is a complicated, hybrid methodology. Although you can make a case for negotiating complicated departures from standard methodology, from a policy standpoint there is much to be said for the clarity of a straight-forward approach. The income tax example discussed in the preceding paragraph provides an illustration of why hybrid settlements are so difficult to apprehend and track; the RCA's order on TAPS demonstrates the enormous fiscal implications of this particular hybrid settlement concoction.

As mentioned above, I participated in the RCA hearing on TAPS on which the commission's November 2002 TAPS order was based. For five weeks, the commissioners, the attorneys for the shippers and the commission's Public Advocacy Section spent much of their time trying to penetrate the smoke screen erected by the industry, with the state's help, in defense of its hybrid methodology. Had the fiscal and public policy consequences not been so great, this magic lantern show would have been hilarious.

In conclusion I would note that Executive Order 111 has already begun to dilute commission authority by weakening the link between the public and the RCA. The executive order states that the purpose is to assure "efficient administration" by avoiding "possible duplication of effort or the taking of inconsistent positions by separate agencies

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[13] Richard A. Fineberg, "New filings reveal oil pipeline owners' tax scam," *Anchorage Daily News*, Feb. 8, 2000, p. B-8.

[14] See: Alaska State House House Oil and Gas Committee hearing, April 13, 2001 and letter from Michael A. Barnhill, Assistant Attorney General, to Rep. Jim Whitaker, May 23, 2000.

of state government."[15] Our government depends on checks and balances; when did consistency with other state policies become the purposes of a quasi-judicial regulatory agency? I am also concerned that the transfer of the Public Advocacy Section to the Attorney General's Office further separates that unit from the public it was created to represent. The importance of public involvement in the regulatory process was brought home last month, when FERC finally issued its report on energy price gouging California – two years after the crisis, long after Enron's collapse and only after insistent prodding from Congress and the General Accounting Office.[16]

The fiscal and broader policy issues served by the RCA's efforts are summarized in the a January 3, 2003 *Anchorage Daily News* "compass" by Walter B. Parker, which I am submitting with this testimony. Historically, almost everybody who has looked seriously and independently at this complicated issue has concluded that the 1985 TAPS tariff settlement undermines competition by ratifying exorbitant tariffs that do not satisfy the statutory requirements of just and reasonable tariffs. I do not argue that the commission or its Public Advocacy Section are models of efficiency. That's not the point. In the case of pipeline tariffs, the RCA has done a masterful job of protecting the public interest in an area of great importance to Alaska's continued development. To the extent that the RCA's ability to function as an independent regulator is emasculated, the agency will not be able to implement that order or do justice to any tariff issue – including DR&R. For these reasons, I am particularly troubled by measures such as HB 277 that dilute the authority of the commission, whose links to the public it represents have already been weakened by Executive Order 111.

Thank you for your kind attention.

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[15] Executive Order No. 111, March 5, 2003.

[16] See: Edward Iwata, "Panel: FERC dropped ball on Enron," *USA Today*, Nov. 11, 2002 (on-line) and Mark Sherman (Associated Press), "FERC Finds Widespread Power Manipulation in California," *Washington Post*, March 26, 2003 (on-line).

Attachment 1.

Author's Sectional Analysis of H.B. 277 (23-LS0980\D):

Section 1 amends a key enabling section of the Alaska Pipeline Act, which enumerates the duties of the commission regarding pipelines, to curtails the authority of the state pipeline commission to regulate the abandonment of pipeline facilities. This section also removes from the commission the authority to investigate performance and compliance with lease terms *(AS 42.06.140[a])*.

Section 2 creates a new subsection that specifically denies the commission jurisdiction over dismantlement, removal and restoration of any part of a pipeline facility *(AS 42.06.230[c])*.

Section 3 further curtails the commission's authority in the complex arena where state and federal jurisdictions overlap. Where the framers of the Alaska Pipeline Act sought to ensure that the state commission would have broad powers to investigate pipeline tariff issues "except to the extent they are preempted by federal law," this legislation would deny the commission authority to "consider revenue collected on interstate transportation when evaluating intrastate rates or tariffs" *(AS 42.06.245)*.

Section 4 further limits commission authority regarding abandonment by specifying that the required commission finding, prior to abandonment, that continued service is not required by public convenience and necessity applies only to service and not to "any portion of a pipeline" *(AS 42.06.290[a])*.

Section 5 establishes a new subsection saying that any pipeline settlement with the state is considered to be in the public interest and conclusively just, reasonable and nondiscriminatory and therefore beyond the purview of the commission unless the state brings a protest or petition that a particular rate does not conform to the settlement terms *(AS 42.06.370[d])*.

Section 6 changes the interest rates on refund payments so that the rates under AS 9.30.070(a) replace the rates under AS 45.45.010(a) *(AS 42.06.400[b])*.

Section 7 specifies that any commission orders regarding rates must be limited to future tariffs and may not be retroactive *(AS 42.0.410[a])*.

Sections 8 through 11 ensure that this act applies to any matters pending before the Regulatory Commission of Alaska on the effective date, that the refund provisions of Section 6 are retroactive to August 7, 1997 and that Section 5 is contingent on Executive Order 111 taking effect.

"Lower pipeline tariffs deserve look"

By Walter B. Parker

"Compass"

***Anchorage Daily News*, January 3, p. B-4**

Alaskans pay a high price today for a bad deal the Alaska Department of Law struck with the owners of the Trans-Alaska Pipeline System (TAPS) in 1985. That is the clear and unmistakable message of the monumental order on TAPS tariffs issued by the Regulatory Commission of Alaska (RCA) Nov. 27.

According to that decision, in recent years the 1985 TAPS Settlement Agreement has resulted in average TAPS tariffs that were 57% too high. Perhaps even more significantly, the Commission calculated that the 1985 agreement enabled TAPS owners to charge $9.9 billion over just and reasonable costs between 1977 and 1996.

As a general rule, lower TAPS tariffs mean higher state revenues. If the RCA tariffs governed, the state would have at least $2.5 billion more for schools, roads and other public purposes.

Unfortunately, the RCA order sets TAPS tariffs only for in-state oil shipped between 1997 and 2000; earlier years were not on the table and Federal Energy Regulatory Commission (FERC) governs rates for more than 90% of TAPS oil.

Other factors complicate the situation. The 1985 settlement allows TAPS owners to offset reductions in intra-state tariffs by increasing inter-state rates. Moreover, separate contractual agreements and regulations use the inter-state rate to calculate royalty and severance on the intra-state oil shipments.

According to the RCA, these factors could result in short-term state revenue losses of less than $10 million per year. But to take that revenue from the state, the TAPS owners would have to petition FERC to increase the same tariffs that RCA found unjust and unreasonable in a 486-page decision that RCA calls "the first time in more

than twenty years . . . that a regulatory agency has reviewed TAPS rates for consistency and statutory standards."

Uncertainty about small, short-term revenue effects should not obscure the following fundamental and long-term public policy truths:

- Lower pipeline tariffs encourage development by reducing total transportation costs;
- Lower pipeline tariffs increase state revenues because transportation costs are subtracted from the price of a barrel of oil before royalty and severance taxes are calculated.

In view of these important considerations, the context of the RCA case deserves further consideration. Historically, the commission and its predecessors favored the widely accepted depreciated operating cost methodology permitting pipeline operators to charge tariffs sufficient to cover repayment of investment, operating costs, taxes and a fair rate of return on investment. Instead of following this standard to determine TAPS tariffs, in 1985 state lawyers agreed to an unconventional TAPS methodology in an effort to end eight years of litigation. The RCA approved the settlement provisionally but left the door open for future protests.

In 1997 Tesoro, then refining oil shipped through TAPS, filed a tariff protest later joined by Williams Alaska, which operates the North Pole refinery, and the RCA Public Advocacy Section. All three parties argued that excessive TAPS tariffs violated the terms of the Alaska Pipeline Act, whose purpose is to insure access to common-carrier pipelines at just and reasonable rates

To deal with legal maneuvering and intense wrangling over document production covering a complicated history, the RCA issued more than 100 procedural orders, listened to five weeks of testimony, reviewed expert reports and sifted through the voluminous record before calculating appropriate tariffs.

The RCA was clearly unimpressed with the defense of the settlement rates presented by the TAPS owners and the state. Rejecting the case presented by the TAPS owners and the state, the commission ordered the TAPS owners to reduce in-state tariffs

for 1997-2000 by an average of approximately $1.00 per barrel. Presumably, orders reducing 2001 and 2002 in-state TAPS rates will follow.

Don't expect the TAPS owners, who have spent nearly $15 million on this case, to give up their ill-gotten gains without a fight; court appeals are likely.

Looking forward, just and reasonable TAPS tariffs will have a far more salutary effect on state revenue and future oil development than almost anything else the state might do. The RCA decision presents the state with a unique opportunity to correct its previous, misguided course.

Walter B. Parker of Anchorage has been active in state transportation and resource development issues for 56 years. He has served as Commissioner of Highways, Director of Technical Staff for the State Pipeline Coordinators Office and Chair of the Alaska Oil Spill Commission, among other things.

TESTIMONY OF RANDAL BUCKENDORF

May 13, 2003 House Labor and Commerce Committee – HB 277

Good afternoon. My name is Randal Buckendorf. I am an attorney for ConocoPhillips where I do our environmental and pipelines legal work. Thank you for allowing me to testify today and I'd like to thank committee chairman Anderson for taking this bill up so quickly.

As you know, 49 days ago, on March 26, I presented testimony to the subcommittee outlining why certain changes needed to be made to the Alaska Pipeline Act. The subcommittee recognized changes needed to be made and Representative Dahlstrom took the concepts we presented, crafted HB 277, and has assisted since that time in getting the parties together, forcing discussions, and getting amendments and the current Committee Substitute drafted to address the various concerns that have been presented.

ConocoPhillips supported changes before you then and supports this bill before you today. I want to take just a few minutes and discuss the main sections of the bill with you, but before I do that, I want to make sure that we all recognize certain of the myths and misperceptions that have been following this bill:

- HB 277 does not overturn the recent RCA Order on TAPS rates (Order No. 151).
- HB 277 does not legislatively approve the 1985 TAPS Settlement Agreement.
- HB 277 does not remove RCA's jurisdiction over establishing intrastate pipeline tariffs.
- HB 277 does not foreclose the State's right to ensure the proper development of its resources.
- HB 277 does not create a jurisdictional gap that will allow the pipeline owner to treat an affiliate shipper any differently than any other shipper of oil.

Rather, the bill is about regulatory clarity and certainty. HB 277 is about creating an atmosphere for the future where companies big and small alike are clear about the rules they explore, develop, and operate under.

Comments have also been made that this bill is in some way seeking to negatively impact the independents and new entrants to the oil exploration scene in Alaska – this is absolutely not true. Furthermore, through amendments made to the bill by House Oil and Gas and this Committee Substitute passed by House Resources, any potential concerns that have been raised have been addressed.

Let's look at each section of the bill:

Section 1

This is a new section proposed by the Administration, and it clarifies the role of the commissioner of DNR in being responsible for ensuring compliance with pipeline leases – this is the proverbial belt and suspenders because it is consistent with both (a) AS 38.35.015 (4), which already says that the commissioner of DNR has all powers necessary to ensure compliance with right of way leases and (b) our actual right of way lease contracts with the state through the Department of Natural Resources, which also give them this right.

Sections 2 and 3

This same area of jurisdictional overlap and discontinuity between the RCA and the DNR is further clarified in Sections 2 And 3. As stated above and made clear by Section 1, leases that are negotiated, entered into, and which are fully enforceable by contract and law should be overseen by DNR, not the RCA.

Pipeline leases are contractual arrangements between each pipeline owner and either the Department of Natural Resources, the Bureau of Land Management, or in some instances a private party. Any implication that the RCA can attempt to insert itself into these leases almost like a signatory party when clearly they are not a party, is unacceptable both from a contractual and regulatory point of view.

The changes recommended in Sections 2 on page 3, line 8 and 9, and in section 3, together with the new section 1 make it clear that it is the same agency that granted our rights of way and entered into the contract with us that oversee these leases and the requirements within those leases.

A Myth you will hear is that the bill will remove RCA authority to oversee money collected on intrastate rates for DR&R. That is incorrect. Another Myth you will hear is that it is an essential duty of the RCA to make sure enough money has been collected to ensure DR&R is performed. That also is incorrect. A pipeline owner is bound by

contract and law to perform the duties required of it in our leases. Further, we must do that regardless of the cost or regardless of how much if any was collected in its rates. The only duty the RCA has and will continue to have after passage of HB 277 is how much, if any, moneys can be collected as part of a pipeline carrier's intrastate tariff. All HB 277 does is clarify what jurisdiction the RCA properly has with respect to pipeline leases. Jurisdiction is the fundamental principle surrounding all regulatory agencies and it needs to be clear. HB 277 does that.

Section 4.

Further clarity of jurisdiction. Jurisdiction on pipelines in Alaska is shared. In fact, every pipeline that ever carries a barrel of oil to TAPS, will be jointly regulated at the state and federal level. The Federal Energy Regulatory Commission (FERC) has jurisdiction over all of the oil produced in the state that ends up being placed on a tanker in Valdez and shipped to the West Coast.... slightly more than 90 percent of the oil transported on TAPS. The RCA on the other hand has jurisdiction over that oil that stays "in-state." It is this basic difference that creates the terminology "intrastate" (RCA regulated) and "interstate" (FERC regulated).

The changes recommended in Section 4 clarify this and are consistent with other provisions in the Pipeline Act where the RCA's jurisdiction is intrastate in nature.

Section 5

Section 5 clarifies the distinction between the requirement to provide service (i.e. move barrels along the pipeline), and the facilities used to do that (e.g. use of one big pump or two small ones). That specific language is found on page 5, lines 5, 6 and 7. What the section does is clarify that the RCA jurisdiction relates to the 'service' aspect of this, leaving the 'facility' side to other regulatory bodies (e.g. the more than a dozen agencies that make up the Joint Pipeline Office). We do not believe that the RCA should be involved in regulating the physical hardware of a pipeline system and their oversight should be focused on the service side of transporting barrels. Some will suggest that the changes in this section will eliminate RCA's jurisdiction over system expansion or system shutdown, which is not correct. So long as the issue is related to the need for pipeline *service* and the current level of pipeline capacity, the RCA will continue to have jurisdiction - indeed the current version of the bill was amended to address certain concerns that had been raised in prior committees relating to restrictions on permanent capacity reduction – page 5 section 5, line 5.

Section 6.

Sometimes we are going to end up in litigation and litigation sometimes ends in orders or judgments with interest. The interest rate that applies to judgments under the Pipeline Act has always been the same interest rate that applied to other judgments. That was the legislative intent in 1978 when it wrote this section of the Act and that was what we advocated before you 49 days ago. We believe that the 1997 tort reform amendments changed or should have changed the applicable interest rate on Pipeline Act judgments. The amendment originally proposed in Section 6 made it clear that the legislature did not intend to single out pipeline companies for different treatment from every other business entity. That change would make the interest rate payable on refund orders to be the same as those required in other judgments issued by the State. The amendments proposed in this latest CS do not quite do that as it does impose a differential rate of 5% (instead of 3%) (page 6, section 6.). We still support the change to a market based interest rate but still ask why this industry is being singled out over all others.

Section 7

The Alaska Supreme Court has stated that the RCA's powers do not include the power to bypass the rule against retroactive ratemaking. Section 7 makes this clear on page 6, lines 28 thru 30. The rule against retroactive ratemaking is a fundamental aspect of regulated utility law – that an agency cannot retroactively apply a requirement for periods prior in time to when a complaint, protest, or commission action initiated the investigation or hearing. The current text resulted from an amendment made in House oil and gas to make it conform to testimony presented by the RCA and the administration.

Essentially HB 277 makes the RCA's job description more clear and more certain...so you the legislature are setting policy rather than the RCA. And so that all companies who want to do business here in the future know what the rules are.

Section 8

This is a new section proposed by the administration to further clarify the role of the AG in relation to pipeline tariff matters. We support this clarification and feel it is supported by Executive Order No. 111 and opinions of the Alaska Supreme Court.

Thank you for this opportunity to comment. I am happy to answer any questions you might have either now or later in the hearing.

May 13, 2003 Testimony: House Labor & Commerce Committee[1]

Mr. Chairman: I am Dave Harbour, Chairman of the Regulatory Commission of Alaska.

CS For House Bill No. 277(RES) proposes major changes to the existing regulation of pipelines under AS 42.06. The Commission recognizes that these changes would have dramatic impact on pipeline regulation and produce regulatory voids between State and federal jurisdictions. We provide you with the following background and legal concerns with the proposed legislation.

Background

Facilities. Under current law, the Commission ensures that each facility is appropriately constructed, operated, maintained and abandoned. Further, the Commission assures that when a third party seeks connection to an existing pipeline, it is able to do so in a reasonable manner and paying just and reasonable rates.

DR&R. The RCA now examines Dismantlement, Removal & Restoration ("DR&R") issues at several times during the life of a pipeline. When setting initial rates DR&R is a cost that must be recovered in rates. The Commission sets rates to insure that adequate DR&R is collected through tariffed rates and that the costs are spread fairly amongst shippers throughout the life of the pipeline. These regulatory responsibilities are important to insure that adequate funds are available to complete DR&R at the end of the pipeline's life and protect the interests of state, federal, private and Native landowners and to insure that shippers throughout the pipeline's life pay just and reasonable rates. The agency resolves the tension between shippers who want low tariff rates, carriers who want high rates and landowners who want assurance that their lands are protected. At the end of a pipeline's life the Commission ensures that whatever DR&R the state, federal, private or native landowners require is completed and the DR&R funds collected over the life of the pipeline are used. The RCA also resolves under or over collection issues.

Legal Issues

There are four substantive changes proposed by CS for House Bill No. 277(RES). *First*, all RCA jurisdiction over dismantlement, removal, and restoration (DR&R) of pipeline facilities is removed; pipeline regulation is restricted to intrastate shipping issues even when the Commission must understand interstate issues to decide on intrastate matters. *Second*, by not allowing the RCA to consider the amount of DR&R collected in interstate rates of a pipeline that transports both within the state and for export, the bill makes it impossible for the RCA to assure that intrastate rates include just and reasonable amounts for DR&R. *Third*, it improves but does not resolve ambiguities in AS 42.06.400. *Fourth*, it clarifies already existing powers of the Commissioner of the Department of Natural Resources and the Attorney General, which do not include ratemaking powers or regulatory jurisdiction over facilities of intra- and interstate

[1] Draft submitted with approval of the Committee Chairman, May 9, 2003

pipelines as the Commission now has. Below is a section-by-section review of the Proposal.

Section 1 of the proposed bill clarifies the responsibilities of the Commissioner of the Department of Natural Resources to lead and coordinate the investigation of the performance obligations under and compliance with the terms of the leases issued by the State; including obligations with respect to the dismantlement, removal and restoration of a pipeline or pipeline facility. The guarantees issued by the TAPS Carriers for DR&R on TAPS run through the Commissioner of the Department of Natural Resources for state lands. The bill codifies responsibilities the Department of Natural Resources now has to set DR&R obligations on state lands.

Section 2. The legislature originally intended that the Alaska Pipeline Act grant an objective, non-political commission regulatory power over all regulatory services and facilities not covered by Federal Law, including DR&R. The deleted language to section 2(a)(2) and 2(a)(8) remove the RCA's ability to confirm that DR&R is completed before granting abandonment to pipeline companies when they are prepared to leave doing business in the State. The Commission recommends not deleting the language in Sections 2(a)2 and 2(a)(8).

Although the FERC has authority on tariffs relating to DR&R, it has no DR&R authority over pipelines or facilities within the State of Alaska; it has jurisdiction only over interstate rates. Other Federal agencies may have jurisdiction over DR&R work on on federal lands, but not on rates sufficient to perform DR&R on private or Native lands or confirming that DR&R is actually accomplished. Thus, the proposed amendments leave **regulatory voids** with respect to facilities on non-state owned land and leaves no single agency in charge of ensuring, before permission is granted to abandon a pipeline, that pipeline owner has satisfied or has the financial reserves necessary to handle all DR&R obligations.

The proposed deletion of language in sections 2(a)(2) and 2(a)8 highlight the perennial internal conflict within state government. You have been spared the dispute that often arises between the Departments of Revenue and Natural Resources because the Department of Law with respect to this bill represents both departments.

Because of its royalty interests, the State of Alaska is often a party to pipeline tariff settlements that include issues of rates and DR&R obligations. The State of Alaska was a party to the Intrastate TAPS Settlement Agreement in 1986. That agreement described a methodology for calculating rates that included DR&R. The DR&R aspects of that settlement have not yet been reviewed to determine if they are just and reasonable. That issue is in three open dockets now before the Commission. Because of its responsibility to protect its economic interest in settlements and its interest in protecting the State's natural resources, it is difficult for the State to have an objective public policy perspective that includes the position of shippers and third party landowners. In pending litigation the TAPS Shippers have protested the amounts collected for DR&R as excessive and the means for accounting for the collected funds as inadequate. It is well

documented that the Carriers and the State were aware when they signed the Settlement that the Settlement would be subject to review if and when a protest was filed. This was part of the parties' understanding, not the RCA "changing the deal."

If the Legislature limits the RCA's ability to ensure that DR&R is properly completed and funded both on State lands as well as other private and federal lands within the State, the RCA can no longer act to protect the interests of the State, shippers and third parties. This is especially true when ownership of interests in the pipeline are later sold to other (perhaps less viable) parties. The RCA will not be able to ensure that the right amount will be collected through tariffed rates to fund DR&R, that the funds collected to date will be available when they are needed, or that all of the DR&R that needs to be done will in fact be accomplished, not just on State land.

The Departments of Law, Natural Resources and Revenue represent the interests of the State of Alaska but they do not represent third party shippers, private and Native Land owners, or the public. To restrict the RCA's ability to investigate what the DR&R obligations are, whether DR&R obligations are being met financially, and finally whether DR&R is actually accomplished on all lands within the State would make it extremely difficult to ensure that DR&R is properly funded and accomplished within Alaska. Therefore, the proposed amendments in Section 2(a)(2) and 8 are contrary to the public interest.

Section 3 removes all RCA jurisdiction over DR&R except collection in rates of amounts necessary to cover intrastate DR&R. I have discussed above that so doing will leave a **regulatory void** with no agency able to assure that the total amount of DR&R collected will be appropriate and that prior to pipeline abandonment all DR&R is accomplished pursuant to all agreements among the Carriers, the State, the federal government, and private landowners. Further, as discussed below with respect to Section 4 of the proposed legislation, the Commission will be unable to set reasonable intrastate DR&R collections.

Section 4 restricts the RCA's ability to evaluate interstate DR&R collections when determining whether intrastate DR&R collections are appropriate. This limitation makes it impossible to determine whether DR&R collections are adequate. Although more that 95% of the oil flowing through TAPS is interstate, the majority of land over which the pipeline travels is State, Native and private. The total amounts collected for interstate DR&R are thus germane to whether sufficient **total** funds will be collected to complete DR&R. If the RCA is unable to determine how much has been collected through interstate rates, it cannot determine how much needs to be collected from intrastate tariffs to ensure that sufficient funds will be available to complete DR&R on all lands within the State. The only alternative—an unreasonable one—would be for the Commission to saddle the roughly 5% of intrastate shipments on TAPS with paying for all of the DR&R costs, resulting in extremely high intrastate rates. High intrastate tariff rates discourage exploration and development of oil within the State. FERC sets interstate rates, but the RCA needs to know the ***amount*** of interstate collection for DR&R

to set appropriate intrastate rates.[2] These proposed amendments preclude the RCA's ability to appropriately set intrastate DR&R portion of rates.

Current AS 42.06.245 is clear as written. The proposed changes presumably written in an effort to address DR&R create a conflict within Section 245. Specifically, the sentence that begins on line 27 of page 4 states: "The commission may not base intrastate rates on revenue collected from interstate transportation." The very next sentence states: "Nothing in this section limits the powers of the commission to consider both interstate and intrastate pipeline revenue requirements." With respect to DR&R, the commission cannot consider interstate pipeline revenue requirements without looking at revenue collected from interstate tariffs.

Section 5 clarifies that pipeline owners may reduce capacity without approval of the Commission provided that the reduction is not permanent. This is a regulatory loophole/void, allowing legal, restricted access to a pipeline without Commission adjudication. Reductions in capacity may affect competition on a pipeline, if any. Competition affects rates and service. To the extent that the Commission's obligation is to ensure that rates are just and reasonable and that service is provided, it should maintain jurisdiction to reasonably review changes in capacity. If this change is adopted, the Commission cannot work to ensure that pipeline transport service will be available when prospective shippers need it.

Section 6 is a reasonable effort to correct the ambiguities of AS 42.06.400(b). However, it does not correct all of them. The interest rate to be charged on amounts accrued after the passage of the bill is a matter of legislative policy, as are the other interest rate provisions in Alaska statutes. The RCA makes no comment on the particular rate specified in the draft bill. We note that Section 400, of which the bill amends subsection (b), has been amended several times over the years, resulting in internal inconsistencies. We recommend that the entire section be changed in a number of ways. We would like to suggest these in concert with industry for deliberate and cooperative legislative action in the coming months.

Section 7: To the extent that this Section refers to final rates, it codifies current Commission practice. However, a case is pending before us in which the distinction between filed and final rates is at issue. The proposed language is confusing when placed in context with other provisions of the Pipeline Act. AS 42.06 refers to final, suspended and temporary rates. The commission thus recommends that the word final be inserted at page 6, line 26 between the words "affect" and "rates".

Section 8: The Commission supports the additional language of Section 8 and encourages the Attorney General to consult with affected agencies, particularly when agencies within the State have conflicting interest regarding rates, royalties and DR&R.

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[2] The Sectional Analysis for CS for House Bill No. 277(RES) states "the FERC does not consider intrastate revenues when it determines what can be charged for interstate rates." This statement is not accurate with respect to TAPS. Under the TAPS Settlement Agreement, revenues paid by intrastate shippers are subtracted from the Interstate revenue requirement.

Sections 9 and 10: These sections have significant impact on the roughly 40 pending pipeline cases. The effective date of these amendments may prompt constitutional challenges, delaying the conclusion of pending dockets and disrupting an otherwise stable business environment. As the Pipeline Act is currently drafted, pipeline carriers are guaranteed a recovery of all reasonable pipeline costs and a reasonable return on their investments. Shippers are guaranteed that their rates shall not exceed reasonable pipeline costs and a reasonable return to pipeline carriers on investment.

I would like to point out that various parties have represented sincethe introduction of HB 277 that HB 277 has no retroactive effect and will not affect current open dockets or orders of the Commission. The very nature of the proposed substitute language should make clear that CSHB 277 has is retroactive. The proposed language parces out effective dates depending on what parties' interest are at stake. On these grounds alone, this language should not be accepted.

If a commission has issued an order valid under current law, legislation should not be enacted to invalidate that order at the advantage of some parties and the expense of others. The only appropriate effective date to any changes to the Pipeline Act should be for dockets filed after the effective date of the legislation. Changes to laws should only apply prospectively. Otherwise, parties making business decisions are forced into an UNSTABLE business environment; they can have no confidence in either the laws that you pass or the orders of this commission.

The majority of changes proposed by this bill, as noted above, represent certainty to some segments of industry at the expensive of other current and future investors. The changes obscure Alaska's investment climate and erode the adjudicatory jurisdiction created during 30 years of Legislative balancing of public interests.

NOTE: While we have not been asked for a fiscal note, I should report that though no fiscal impact in the agency can be determined at this time, we could expect a significant amount of litigation expense to arise as a result of this legislation if it is passed.

Section 1. This does not represent any change in existing practice; DNR issues and enforces the leases now. But the section would clarify statutes in this regard. This section would make the commissioner of DNR the lead agency to investigate the performance of obligations under and compliance with state leases issues by DNR, including dismantlement, removal, and restoration (DR&R) obligations under state right of way leases.

Section 2. Specifies that the commission regulates pipelines and pipeline carriers in the state to the extent applicable to intrastate transportation. This language is consistent with current statutory intent, and is an improvement over the bills original language. Something the committee process has worked to improve on. Additionally, this section would remove from the commission's jurisdiction any oversight of the performance of a pipeline carrier's obligation under state leases. The lease is a contract between the state and the carriers for the use of state land and the state would prefer not to have the commission interpreting or enforcing it's contracts. The leases do not contain the regulation of the pipelines. The commission retains that jurisdiction under it's authority to issue certificates of public convenience and necessity and its other statutes and regulations.

Section 3 would provide expressly that the commission would not have jurisdiction over DR&R, over amounts collected from *interstate* shippers for DR&R, but would have jurisdiction over amounts collected from intrastate shippers for DR&R.

Section 4. This section would again clarify that the commission has jurisdiction over rates and charges where the pipeline is engaged in intrastate commerce, including the intrastate portion of a pipeline that is also subject to federal jurisdiction. The section would prohibit the commission from considering interstate revenues (amounts collected from interstate shippers) when evaluating intrastate rates. Similarly, the FERC does not consider intrastate revenues when it makes clear that the commission can consider the total costs of operating the pipeline—both interstate and intrastate—as needed in order to determine how much of that amount can properly be included in the intrastate rates.

Section 5 would delete the requirement that a carrier obtain commission approval for discontinuing use of all or part of a pipeline, so long as the carrier is not permanently reducing the capacity or discontinuing the service. If transportation services or being discontinuing or capacity is being permanently reduced, the carrier must seek commission approval. The change will allow a

carrier to make necessary changes to infrastructure for safety, efficiency or other reasons, without having to go to the commission, so long as transportation services are not affected.

Section 6 would replace the existing interest rate of 10.5% for amounts to be refunded with a new interest rate, which floats with or is tied to the 12th District, Federal Reserve discount rate in effect in each year for which refunds are due. (for your info the present rate is 2 ¼ percent)

Section 7 would provide clear statutory language for what rates are affected by a commission order. The section would provide that an order would not affect rates that had been charged before the protest, complaint, or other action that initiated the proceeding. This change would alert a carrier that its rates are being challenged and may be subject to refund, but would not contravene the filed rate doctrine by allowing an order to reach back an affect earlier rates that had not been protested.

Section 8. This section would codify existing practice with regard to the attorney general's role over tariff matters. It would provide that among the duties of the Attorney General is the duty to consult with affected agencies regarding pipeline tariff matters, and to

participate in tariff proceedings on behalf of the state. Current RCA statutes make clear that the attorney general represents the state in tariff matters before the FERC, but it is not stated expressly with regard to proceedings before the RCA. This section would clarify this role, similar to the clarity providing in section 1 with regard to the DNR commissioner's authority over state leases and DR&R, and in other sections dealing with the RCA's authority over regulating pipelines and pipeline carriers.

Section 9. This section would make the Act applicable to matters pending before the commissions on or after the effective date of the Act. The Act would not apply to the commission's order 151, which is pending before the superior court.

Section 10. This section provides for an immediate effective date.

Summary of Anadarko Comments on HB 277
House Oil & Gas Committee

HB 277 is:

- not good for Anadarko
- not good for other independents
- not good for any explorers who aren't also pipeline owners
- not good for in state processors who add value and jobs
- not good for the state

For Non-pipeline owners, HB 277 would:

- Discourage exploration
- Discourage in state value added industries
- Decrease the economics of Alaskan prospects
  - Increases risk of unreasonable shipping costs
  - Settlements can be renegotiated creating uncertainty
- Decrease fiscal certainty
  - No requirement that rates are just and reasonable. Rates are simply deemed reasonable by this legislation, regardless of the rate or deal terms.
  - No requirement that throughout the term of the deal rates remain reasonable
- Eliminate any public process to ensure reasonable rates
- Eliminate the ability to appeal unreasonable rates before any body, regulatory or judicial
- Eliminate the ability to even challenge rates that exceed the terms of an agreement
- Increase the odds that shipping rates will be unreasonably high

For the state, HB 277 would:

- Increase the risk that the state loses revenue through unreasonably high transportation charges
  - Each dollar of excess transportation charge costs the state about 25 cents
  - The RCA found that TAPS carriers have "recovered $9.9 billion more than the reasonable cost of providing service." This means the state's potential loss is over $2 billion.

Inferences that the APUC (RCA) and/or FERC approved rates as reasonable, that the 1986 agreement was overturned by the RCA's consideration of a rate appeal, or that the 1986 agreement has not been honored, are incorrect.

Statements by ConocoPhillips and BP:

- "The Regulatory Commission of Alaska (RCA) has overturned a 1986 agreement with the State..."
- The agreement, "...was approved by the Federal Energy Regulatory Commission as "fair, reasonable, and in the public interest.""
- This legislation will, "...provide the confidence that an agreement with the State will be honored by all parties..."
- "The (method) under which the question arose was previously approved by the state of Alaska and FERC."

The APUC (RCA) & FERC:

- Did not review the rates and approve them as just and reasonable
- Did not impose the settlement on nonparticipating parties
- Did allow for future challenges to the rates
- Did state that the carriers would be required to prove that rates established under TSM were just and reasonable

In fact, in their brief in support of the settlement, the TAPS carriers agreed that future rates could be challenged and reviewed:

> "If any non-signatory objects to the level of a future tariff rate, whether set within the confines of TSM or not, this Commission's processes remain available for the examination of that rate."

Contrary to the policies agreed to in 1986 by TAPS carriers, the state, APUC & the FERC, HB 277 attempts to:

- Prevent the review of rates
- Impose settlement terms on non-participating parties
- Prevent future rate challenges
- Remove the statutory requirement that rates be just and reasonable

Anadarko is concerned that:

- Current rates are excessive
  - The RCA found that 1997 thru 2000 rates were on average 57% too high. $1.50 per barrel has a large impact on the economics of prospects and on the value of our production.
- This bill increases the likelihood that excessive rates will continue in the future
- Independents will be significantly disadvantaged by this legislation
- Exploration will be discouraged

Anadarko Testimony Opposing HB 277

House Oil & Gas

Thursday, April 24, 2003, 3:15 p.m.

Mark Hanley, Alaska Public Affairs Manager, Anadarko Petroleum Corporation

Anadarko is one of the world's largest independent oil & gas exploration and production companies. At Anadarko we are explorers, using quality people and technology to find new reserves around the globe. We have a large acreage position in Alaska and are excited about the potential for oil and gas exploration in Alaska.

If you want to encourage Anadarko, other independents, and even majors who don't own part of the pipeline to come to Alaska and explore for oil and gas- then this bill is a bad idea. If you want to encourage the jobs and added value that comes from instate processing and instate use of Alaska's oil and gas- then this bill is a bad idea. If you want to help ensure that the state gets full value for its royalty oil and gas- then this bill is a bad idea.

Let's be clear what this bill is all about. The Regulatory Commission of Alaska found that the rates charged by TAPS carriers were excessively high -- by an average of 57% between 1997 and 2000. The settlement agreement between the state and the TAPS carriers insulates the TAPS carriers from claims the state could otherwise have made for the recovery of the billions of dollars the state potentially lost as a result. The agreement does not -- nor could it -- insulate the TAPS owners from overcharge claims other shippers were to make on the basis of the same rates the RCA found were excessive. But having shielded themselves by agreement from overcharge claims the State would otherwise have been able to pursue, the TAPS owners now want the legislature to insulate them against the legitimate claims of other shippers. We think that would be a mistake.

It's challenging enough exploring for oil and gas in Alaska, without having to worry about <u>not</u> being able to appeal excessive transportation charges for shipping your product down a pipeline. But that's what this bill would prohibit. Without public process, legislative review, regulatory

commission review or even participation by affected shippers, a deal could be negotiated with pipeline owners and the intrastate rates established by that deal could not be challenged.

This bill, without ever seeing the details of an agreement, predetermines that any negotiated pipeline tariff settlement, is in the public interest. It also predetermines, without ever actually seeing the shipping rates and rates of return and regardless of how high they might be, that those rates are "just and reasonable". The agreed upon rate or rate methodology cannot be challenged. Shippers who are not pipeline owners can't even appeal rates that are above those agreed to in the settlement.

While all companies want the best rate of return they can get, companies that ship oil & gas down pipelines and who also own those pipelines, have an incentive to shift as much profit as possible to the pipelines through high transportation rates. State royalties and taxes are based on well head value. Higher transportation costs lower the well head value and mean less paid in state royalties and taxes. This is one reason why pipelines are regulated and why they work on a cost plus type system, allowing them the opportunity to recover their costs, plus a reasonable rate of return. Pipelines are generally regulated to prevent artificially high transportation costs which could stymie competition in exploration.

Under this bill, if higher than reasonable rates were negotiated, the state would lose money and companies like Anadarko would be discouraged from Alaskan exploration, because those higher transportation costs would decrease the economics of our prospects. Contrary to the TAPS settlement agreement from 1986, this bill would prohibit the evaluation of rates to determine if they were excessive.

Now often, when reviewing legislation, you have to envision hypothetical situations to judge the potential effects of a bill. In this circumstance, we have a real life example to use as a case study and ironically, it seems that both the promoters of this bill and those of us who oppose it are using the same example to justify our positions. It's pretty clear that if this legislation had been in effect in 1986, Tesoro and Williams would not have been able to challenge the intrastate rates as excessive. The RCA would not have been able to review the rates and find that shippers were

paying 57% too much and that the state was losing billions of dollars in revenue because of high transportation costs. Despite the fact that a lot of things change during a 30 year deal (with no re-openers) no one would have been able to review the rates to see if they were excessive.

I suspect that you have seen the letter to Representative Tom Anderson where ConocoPhillips suggests that the Regulatory Commission of Alaska overturned an approved deal that was made back in 1986. "The Regulatory Commission of Alaska (RCA) has overturned a 1986 agreement with the State...". The agreement, "was approved by the Federal Energy Regulatory Commission as "fair, reasonable and in the public interest."" They go on to suggest that the 1986 agreement has not been honored, because this legislation will, "provide the confidence that an agreement with the State will be honored by all parties...".

A BP spokesman in a Dec. 31, 2002 Anchorage Daily News article stated, "The (method)under which the question arose was previously approved by the state of Alaska and FERC."

Inferences that the APUC (RCA) and/or FERC approved rates as reasonable, that the 1986 agreement was overturned by the RCA's consideration of a rate appeal, or that the 1986 agreement has not been honored, are incorrect.

The "rest of the story" is that at the time of the settlement, neither the Alaska Public Utilities Commission nor the Federal Energy Regulatory Commission ever reviewed and approved the rates as just and reasonable. Both the APUC and the FERC refused to impose the settlement terms on nonparticipating parties and both anticipated potential rate appeals in the future. The "deal" was that the rates could be challenged as excessive by someone other than the settling parties, and now ConocoPhillips and BP are trying to change the deal because they don't like the RCA ruling in response to a rate appeal.

Let me read a couple of statements from the recent RCA ruling. "Our predecessor agency accepted the Intrastate Settlement (the Settlement) because all affected parties supported it; the Commission did not decide that the Settlement produced just and reasonable rates." "The Alaska Public Utilities Commission (APUC) deferred the issue of whether TSM produced just and reasonable rates until a

shipper protested the rates." "Under the Alaska Pipeline Act, the Carriers have the burden of proving that the rates calculated and filed using TSM are just and reasonable."

Here are statements made by the TAPS Carriers in 1986 and 1987 in support of the offer of settlement. "The settling parties are not asking the Commission to approve at this time the rates to be charged in 1990 and later years. To the contrary, as the settling parties have repeatedly stated, TSM simply sets forth voluntary rate ceilings that the TAPS Carriers have agreed not to exceed in filing their future tariffs. If the Staff finds that the rates set under TSM in 1995 are too high, that issue can be addressed at that time." "If any non-signatory objects to the level of a future tariff rate, whether set within the confines of TSM or not, this Commission's processes remain available for the examination of that rate.

The following FERC statements are from the June 27, 1986 order approving the settlement. "In response to numerous allegations, we categorically state that our approval of this settlement is not a precedent as to future TAPS' rates." "The carriers cannot rely on the approved settlements to establish the justness of these filed rate changes, since the settlement rates were never adjudicated to be just and reasonable." "The burden of showing that the new rate is just and reasonable will be on the TAPS carriers,...". "...the Commission is not at this time imposing the terms of the Settlement Agreement on any nonsettling party."

It seems quite clear that the "deal" agreed to in 1986 allowed and anticipated future appeals to determine just and reasonable rates. Now, ConocoPhillips and BP want to change the deal and take away the ability to review intrastate rates that have been determined through a settlement agreement. This puts non-pipeline owner shippers at a disadvantage and could discourage exploration.

According to the RCA ruling, the maximum TAPS intrastate filed rates for the years 1997 through 2000 were too high by an average of 57 percent. The RCA also states that "the rates charged between 1977 and 1996 provided the TAPS Carriers with the opportunity to recover $9.9 billion more than the reasonable cost of providing service." If this is true, the state has potentially lost

billions of dollars in revenue because the high transportation costs reduce the well head value of the state's royalty oil.

Lower transportation costs will encourage new exploration in Alaska. The ability to appeal potentially excessive transportation rates discourages the filing of high rates and provides certainty to shippers that rates will be reasonable. Prohibiting the appeal of potentially excessive rates, as HB 277 would do, will discourage exploration.

Pipeline companies should have the opportunity to recover costs and earn a reasonable rate of return. They should not be entitled to excessive rates of return that diminish competition, discourage instate investment and cost the state money.

The state is about to begin negotiating a long term fiscal package on a proposed Alaska natural gas line and the TSM will also have to be eventually negotiated. Don't remove negotiating tools from the state's table before the negotiations even begin. And don't prohibit folks in the future from reviewing rates to ensure that they are just and reasonable.

Anadarko is strongly opposed to this bill. It's bad for explorers, it's bad for refiners, it's bad for the state and at a time when the goal is to encourage new companies to invest and explore in Alaska, this would be the wrong message to send.

Thank you for the opportunity to testify.

Frank H. Murkowski, Governor

Alaska Department of Community and Economic Development

Regulatory Commission of Alaska
701 West Eighth Avenue, Suite 300, Anchorage, AK 99501-3469
Telephone: (907) 276-6222 • Fax: (907) 276-0160 • Text Telephone: (907) 276-4533
Website: www.state.ak.us/rca/

April 25, 2003

Honorable Nancy Dahlstrom
Alaska State House of Representatives
State Capital
Juneau, Alaska

Dear Representative Dahlstrom:

Yesterday, I joined others at the Anchorage LIO for a hearing on House Bill 277. You and the Chairman agreed to take the bill up next week, giving Members a few more days to consider amendments to the original.

Since the bill would have such far-reaching impact on the Alaska Pipeline Act and on its administration, I thought you might wish to have the Commission's analysis now, while final wording is being considered.

Having received so many queries from other legislative offices on the impact of this legislation, I am taking the liberty of copying Members with the same information.

Best wishes,

Dave Harbour
Chairman

cc: Members, Alaska State Legislature

Response to House Bill 277: April 24, 2003

Good afternoon Mr. Chairman and Members. I am Dave Harbour, Chairman of the Regulatory Commission of Alaska. I appreciate the opportunity to testify.

My duty and goal today is to describe for you how the bill will change current law and affect the public interest.

House Bill 277 amends the Pipeline Act; undoing several recent RCA decisions on TAPS tariff rates and dismantlement issues, and preventing any future commission from resolving similar disputes. In November 2002 the RCA issued an order finding that the rates charged for intrastate shipments on the Trans Alaska pipeline from 1997 to 2000 were an average of 57% more than the reasonable costs that the carriers incurred to transport the oil. The Carriers were ordered to pay refunds, and to make additional filings so that cost based rates could be set prospectively. The estimated refunds owing to shippers who used TAPS between 1996 and 2000 are more than $80 million, plus interest. The Carriers have appealed that ruling. This draft legislation greatly limits the RCA's jurisdiction over the Trans Alaska Pipeline and all other pipelines in the state, both in the past and in the future. It undoes parts of the RCA's decision that was based on an extensive record that the parties have spent more than $18 million creating. The November order, which is available on our commission's website (http://www.state.ak.us/rca/orders/2002/P97004_151.pdf), exhaustively details the review of the evidence filed by the parties and the reasons for the decision that the industry sponsor(s) of this bill seek to reverse. You should be aware that HB 277 makes significant changes to the RCA's role in regulating all pipelines in response to one or two special interest parties attempting to reverse an RCA Order only affecting TAPS.

My ability to comment specifically about the provisions of this bill is limited by the fact that it addresses issues that are still pending before the RCA for decision. Major advocates of this bill are aware of that because they are party to those cases. I cannot comment in detail on the merits of their proposals without impairing my ability and commitment to sit as an impartial decision-maker on those important cases. I can discuss the broader policy implications of what this bill proposes.

Pass. . bill would allow the pipeline owners (who are also the major producers on the . rth Slope) to set intrastate rates with no input from shippers other than the state. To the extent the Legislature seeks to improve Alaska's investment climate, it could make the climate for future development by small-scale producers less secure; thus possibly reducing the state's future revenue stream. The bill would allow the pipeline owners to set rates without oversight from the RCA, and could have a significant impact on the state's ability to recover royalty revenues from future producers of its resources.

What is being represented in this bill as a simplification of the pipeline rate setting process is likely to be more complex and litigious in its implementation than the current system. What is being presented as increasing investment clarity for producers and affiliated carriers could be later seen as decreased investment clarity for other players: explorationists, current and future shippers.

Allowing rates to be set by affiliated producers/carriers without input from the shippers who will be expected to pay them would violate their due process rights. Therefore, if passed in this form, the bill invites litigation in the Courts rather than regulatory treatment. The bill puts the state, presumably through the Department of Natural Resources that has statutory responsibility for managing the state's resource interests, in the position of protecting the public interest on pipeline tariffs. However, the state's economic interests in production and shipment of its oil may not always be consistent with all other current and future shippers. Being saddled with the responsibility to protect the interests of all shippers naturally conflicts with the state's ability to act to further its own economic interests, or may preclude other intrastate shippers seeking reasonable pipeline rates, from being represented. *

The section of the bill that addresses the interest owing on refunds is properly within the Legislature's province to decide prospectively. Section 6 seeks to clarify the interest rate on refunds. However, Section 10 of the current version of this bill makes the interest rate changes effective retroactively, a change that could raise constitutional challenges from parties to the current TAPS litigation. As the Legislature considers changing the historical interest rate on refunds, it should evaluate its authority to do so retroactively, and what litigation an attempt to do so might spawn. The refunds owing

under the TAPS order are estimated to exceed $80 million. These funds were collected from shippers between 1996 and 2000; therefore, accrued interest is significant.

This bill would limit the Commission's jurisdiction, which is clearly defined in AS 42.06 and conforms to that of other state regulatory agencies. The Legislature intended that the Alaska Pipeline Act allow an objective, non-political commission to have broad regulatory responsibility. AS 42.06.245 states "nothing limits the powers of the commission set out in this chapter except to the extent they are preempted by Federal law." When considering the passage of AS 42.06.245, my dear friend, Senator Cliff Groh, who was the chairman of the legislative Committee that proposed the Pipeline Act, said, "The State attempted to regulate to the maximum extent possible, but would have neither the power nor the ability if preempted by federal law."[i] When considering the scope of the RCA's jurisdiction, the Legislature might be wise to explore to what extent Federal law preempts the Commission's jurisdiction. If the Legislature wants to further shape or limit the our jurisdiction, it would be essential to identify and look at the areas in which Federal law does not govern and consciously decide where jurisdiction should lie and where the Legislature consciously wishes to create a regulatory void.

This bill will also affect how the Commission regulates gas pipelines. We had previously responded to legislators' concerns that we could protect the public interest even when Contract Carriage language is included in the Alaska Pipeline Act. We must now inform the Legislature that we would be unable to act, under HB277, where pipeline owners reach a separate agreement with the State of Alaska. In recent hearings on HB204/SB151 we affirmed we could still regulate intrastate gas pipelines in the public interest where pipeline owners are allowed to employ contract carriage in their tariffs. With the proposed statutory language in HB 277, when the State reaches a settlement with a pipeline owner on its rates, the rates are considered to be just and reasonable. This effectively removes our ability to act on any protests from shippers who are not part of the settlement. Such settlements are likely to be similar to contract carriage agreements that were discussed during the HB204/SB151 hearings. We believe you will agree that the effect of this legislation is to move rate making from RCA public proceedings, into private negotiations between the State DNR/DOL and the Pipeline Owner, excluding other shippers.

We counsel the Legislature that while HB 277 addresses the interests of at least one TAPS owner at the expense of non-owners and future parties, it may also undermine the Legislature's intent to insure that future pipeline tariff rates are fair and reasonable. Attached is a section-by-section analysis of HB 277, which we hope you will find useful.

Thank you for this opportunity.

Section-by-Section: HB 277

Section 1

The proposed change to AS 42.06.140(a)(1) limits the RCA's authority over pipeline carriers that carry interstate and intrastate shipments. This limitation represents a major policy shift in the State's regulation of pipelines. Such a policy shift should only be considered after a comprehensive analysis of all the provisions of AS 42.06 as well as the provisions of AS 38.35, the Right-of-Way Leasing Act, which was passed as a companion act to the Pipeline Act in 1972.

Under AS 42.06.140(a)(2) the RCA now has jurisdiction concurrently with DNR concerning compliance with state pipeline right-of-way leases. The proposed change to that section would leave that authority solely with DNR.

The proposed changes would delete the word "facilities" from AS 42.06.140(a)(2) and (3), removing the RCA's authority to investigate pipeline facilities and order changes to facilities. The proposed change to AS 42.06.140(a)(8) would remove the RCA's authority to require a pipeline carrier to obtain a certificate to abandon a pipeline facility.

The RCA's authority over pipelines is in some ways more comprehensive than its authority over utilities. For example, no person can begin construction of a jurisdictional pipeline without a certificate from the RCA. Utilities do not require permission to construct facilities, only to operate them. The Legislature has given the RCA authority to act in the public interest to oversee pipeline facilities. As a practical matter, the RCA and APUC have not used that authority to affect pipeline location and routing because the pipelines that have been built in Alaska cross state land and DNR has taken the lead in such matters.

The proposed language in this section creates confusion because there are other provisions of AS 42.06 not subject to proposed amendments, which give the RCA explicit authority over facilities. AS 42.06.310 gives the RCA authority to require safe and adequate facilities and to order enlargement of pipeline facilities. AS 42.06.340 gives the RCA authority to order interconnection of pipeline facilities and physical changes to pipeline facilities.

Section 2

The proposed new subsection would remove RCA authority to oversee dismantling, removal and restoration (DR&R) of a pipeline and to oversee money collected for DR&R. Removal of RCA authority over DR&R would mean that there would be no regulatory authority over portions of a pipeline that do not cross state land. Portions of a pipeline that do cross state land would of course be subject to DNR's authority under the state pipeline right-of-way lease. In the case of pipelines that cross both state and federal lands, coordination and consistency to insure that the pipeline is adequately cleaned up before it is abandoned, could be lost.

Section 3

The proposed changes in this section clarify RCA jurisdiction over carriers that are subject to federal regulation. The amended language reflects current RCA practice except the proposed last sentence of AS 42.06.245. That sentence would prohibit the RCA from considering interstate revenues in setting intrastate rates. In order to insure that adequate funds are available to complete DR & R on state lands, the Commission needs to know how much has been collected through interstate rates. A flat prohibition on consideration of those revenues may result in higher intrastate rates. For example, on TAPS, intrastate shipments have historically been less than five percent of the volumes, but more than 50% of TAPS crosses state lands. Without the ability to consider interstate revenues, the intrastate rates may need to be increased to cover more of the DR & R responsibility. The last sentence of the current section, which HB 277 proposes to delete, is in the current statute to give the RCA the authority necessary to protect the interests of the state and intrastate shippers.

Section 4

The RCA has comprehensive authority over the construction of a pipeline. Removing the RCA's authority over abandonment of physical pipeline facilities would mean that the RCA would not have similar authority over the deconstruction phase of a pipeline. That change represents a major policy shift. While DNR would have authority over the deconstruction of portions of a pipeline on state land, there would be a regulatory void concerning Alaska portions of pipelines not on state land.

Section 5

The proposed new subsection would remove all RCA authority over intrastate rates for the entire term of any settlement reached by the State and a pipeline carrier. The State, which has not often chosen to include shippers in the process, whether interstate or intrastate, has negotiated past pipeline settlements. The pipeline settlements reached by the State in the past have been for very long terms, typically the expected life of the pipeline. If this subsection is enacted in its current form, intrastate shippers would be deprived of any input into the setting of intrastate rates they will pay for many years into the future. Interstate shippers will still be able to give their input to the FERC before the FERC makes a decision on the settlement.

Section 6

The proposed language in this section would change the rate of interest to be paid on refunds. This is an appropriate matter for legislative decision provided the new language applies to future periods. Applying it to past periods could raise constitutional questions.

Section 7

This proposed change is ambiguous. The RCA and APUC have consistently interpreted the present language of AS 42.06 to provide for two types of rate proceedings, one initiated by the pipeline carrier as a tariff filing and the other initiated either by the RCA or by complaint of a third party.

In a proceeding initiated by tariff filing, the tariff rate is suspended (does not become a permanent rate). Following the ad judicatory proceeding, the rate adopted by the RCA is put into effect as of the date the pipeline carrier proposed for its tariff filing. That is a historic date, sometimes several years in the past, depending on the length of the proceeding. However, putting such a rate into effect as of that date is not retroactive because there has not been a permanent rate during the suspension period.

In a Commission-initiated or complaint proceeding there is a permanent rate already in effect for the pipeline carrier, a rate that the pipeline carrier has not proposed to change. That permanent rate remains in effect until the RCA determines that it is not just and reasonable and sets a new rate. The new rate does not go into effect until at least the date of the RCA order setting the new rate.

If this proposed change to AS 42.06.410(a) is intended to apply to a proceeding initiated by tariff filing, the language is in conflict with the refund language in AS 42.06.400. If the proposed change is intended to apply to a Commission-initiated or complaint proceeding, the additional language is unnecessary.

[i] Minutes of Senate Finance Committee, 8th Leg., 1st Sess. (Nov. 1, 1973 meeting).

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 277
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Natural Resources
Title: Pipeline Utilities Regulation
BRU: Resource Development
Component: Oil and Gas Development
Sponsor: Dahlstrom
Requester: House Oil and Gas
Component No.: 439

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	**	**	**	**	**	**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type–Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

** Negative revenue impacts may be significant. See Analysis.

Over the long term, HB 277 will probably result in a significant negative fiscal impact to the state. It is impossible to accurately predict how deep this loss will be. Primarily, one can point to effects of the bill on the value of the state's royalty oil and gas resources, both direct and indirect.

Continued on next page.

Prepared by: Mark D. Myers
Phone 269-8800
Division: Oil and Gas
Date/Time 4/22/2003
Approved by: Tom Irwin, Commissioner
Date 4/22/2003
Agency: Natural Resources

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. HB 277

ANALYSIS CONTINUATION

In general, higher tariffs for pipeline transportation have a direct negative effect on the state's royalty interests. Over the long term the bill could result in higher tariffs in a number of ways.

* Section 7 creates incentives for pipeline carriers to file excessive rates. If the rate is eventually determined to be unjust and unreasonable, no refunds will be made from the pipeline to the shipper (including the state).

* Section 3 removes the RCA's ability to consider revenues collected on interstate transportation when evaluating intrastate rates, for a pipeline serving both interstate and intrastate markets. This could reduce the RCA's ability to set appropriate intrastate rates.

* Section 5 would determine that rates that conform to a settlement agreement between the state and a pipeline would be conclusively considered just and reasonable. Commercially, sophisticated shippers who are not party to the settlement would not be able to protest rates in the future. This removes the possibility that rates set according to a settlement could ever receive a "mid-course" adjustment, if terms of the settlement agreement eventually failed to reflect just and reasonable levels.

* Section 6 addresses interest rates that are paid on refunds, if the RCA determines that filed tariffs are not appropriate. First, if the difference between a filed and temporary tariff is placed in escrow, then interest on the refunds need not be paid. Second, for funds not placed in escrow, the rate of interest would be changed from 10.5% to the Federal Reserve discount rate plus 3%. For the foreseeable future, this floating rate seems likely to be significantly below 10.5%. Under such conditions pipelines may have incentive to file excessive tariffs. If eventually found to be excessive, the lower rate of return paid on refunds would hurt the state.

Higher tariffs can also indirectly reduce state royalties. Excessive tariffs can substantially reduce the economics of investments in oil and gas development for explorers who do not own a share of the pipeline. This can reduce the amount of exploration and development activity in the state, with consequences for royalty values. Reduced competition in exploration and development could also reduce lease bonus bids on state leases.

STATE OF ALASKA

DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT

REGULATORY COMMISSION OF ALASKA

TONY KNOWLES, GOVERNOR

701 WEST EIGHTH AVENUE, SUITE 300
ANCHORAGE, ALASKA 99501-3469
PHONE: (907) 276-6222
FAX (907) 276-0160
TTY: (907) 276-4533

PRESS RELEASE .....

FOR IMMEDIATE RELEASE:

November 27, 2002

CONTACT:

Agnes E. Pitts or Cathy Sabrowski
Regulatory Commission of Alaska
701 West Eighth Avenue, Suite 300
Anchorage, Alaska 99501
Phone: 276-6222

THE REGULATORY COMMISSION OF ALASKA REJECTS RATES FOR THE 1997-2000 INTRASTATE TRANS-ALASKA PIPELINE SYSTEM, SETS JUST AND REASONABLE RATES, AND REQUIRES REFUNDS AND FILINGS BY CARRIERS

The Regulatory Commission of Alaska (RCA) issued an order today finding that the Trans-Alaska Pipeline System (TAPS) intrastate rates for the years 1997 through 2000 were excessive. The order sets rates in accordance with the Alaska Pipeline Act and directs the TAPS Carriers to calculate and pay refunds to Shippers who transported oil during those years. Based on an analysis of the TAPS Carriers' annual revenue requirements, the rates charged between 1977 and 1996 provided the TAPS Carriers with the opportunity to recover $9.9 billion more than the reasonable cost of providing service. The rates set for 1997 to 2000 are based on costs reported to the Federal Energy Regulatory Commission annually and depreciation recovered through filed rates through the end of 1996. The RCA found that the maximum TAPS intrastate filed rates for the years 1997 through 2000 exceed cost-based rates by an average of 57 percent.

This order is the first time in the more than twenty years of Trans Alaska Pipeline operations that a regulatory agency has reviewed TAPS rates for consistency with statutory standards. Rates before 1996 were determined according to a settlement methodology and based on confidential reports.

A copy of the full text of the order is available on the RCA's website at http://www.state.ak.us/rca/orders/2002/P97004_151.pdf

Anchorage Daily News (AK)
December 31, 2002
Section: Nation
Edition: Final
Page: A1

State weighs pipeline fees

$110 MILLION: If rates are cut, Alaskans, small producers benefit.

Allen Baker
The Associated Press

Wire

Alaska would collect about $110 million more each year if shipping charges for the trans-Alaska oil pipeline were cut to match a recent decision by state regulators. A lower pipeline charge would also provide a huge boost for new exploration on the North Slope.

"It towers over any incentives the state could rationally do," said Mark Myers, head of the state's Oil and Gas Division. "It's every barrel, and it's long term." The rate cut would amount to about $1.50 a barrel, Myers said.

For the new governor, it's an intriguing challenge.

"Clearly there are significant implications whichever way you turn," said John Manly, a spokesman for Gov. Frank Murkowski.

"They're still sorting out what the state's options are," he said. "By the middle of January, he will have identified his approach to this."

At issue is a recent ruling by the Regulatory Commission of Alaska that the price in-state refiners pay to ship oil through the pipeline for 1997 through 2000 was way too high: 57 percent higher than the pipeline's costs. Tesoro and Williams, the two biggest refiners in Alaska, successfully challenged the rates.

But the RCA ruling applies only to oil shipped through the pipeline to Alaska-based users. More than 90 percent of the North Slope's oil ends up in tankers bound for West Coast and Hawaii refineries. The fee for shipping that oil through the pipeline is regulated by the federal government.

The fee is important because the lower it is, the more valuable Alaska oil becomes to the state treasury.

The state collects its royalties and severance taxes after pipeline and tanker charges are deducted.

Of the $110 million a year more the state could collect if the pipeline fee is lowered, about $33 million would go to the Alaska Permanent Fund.

The pipeline shipping fees were basically set in 1985 when the state settled a lawsuit against the pipeline owners over the high fees they were charging. That settlement agreement ends in 2011.

Some legislators think the new RCA decision opens the door for the state to renegotiate pipeline rates.

"There is huge leverage associated with this if the administration chooses to exercise it," said Rep. Jim Whitaker, R-Fairbanks.

Even if the state doesn't challenge the pipeline fees, others could. A lower fee would help lower costs for the growing horde of smaller independent oil companies that have begun producing or exploring on the North Slope in the past few years.

An independent producer like Anadarko or a refiner could also ask federal regulators to lower the rates, Myers said.

The pipeline is owned mainly by the biggest producers at Prudhoe Bay: BP, Conoco Phillips and Exxon Mobil. They effectively pay themselves to move their own oil, so there's no incentive to reduce rates.

Just how much profit do pipeline owners collect for transporting oil? The RCA determined that through 1996, the pipeline generated $9.9 billion beyond the profit that standard ratemaking rules would allow. If that figure is correct, the state lost about $2 billion.

High pipeline rates have been a huge drag for nonowner producers, who have beaten a path out of Alaska over the years.

In 1993, Conoco traded to BP its interest in the Milne Point field, which it had discovered. Executives said then that the cost of moving crude to Valdez was sucking up the company's Milne Point profits.

"Other folks who have looked at expanding their exploration up here have really balked at (the pipeline) and the captive tanker fleet," Myers said. "It's been something we've had our eye on for a long time. The governor wants to grow production. To do that, he needs more capital on the Slope." Lower pipeline charges could attract that capital.

The state was widely criticized for negotiating a bad deal when it signed the 1985 settlement.

Though the settlement runs through 2011, all agreements are subject to renegotiation, Whitaker said. The state had leverage to extract concessions from the industry at such junctures as the BP takeover of Arco Alaska Inc. in 2000 or this fall's renewal of the pipeline's permit to cross hundreds of miles of state land.

"These are major players, and they interact with the state on many levels," said Robin Brena, a lawyer for Tesoro Alaska Co. in the in-state rate case. "I don't think the state's hands are tied at all. There's nothing that limits the renegotiation of bad contracts."

Tesoro could challenge the interstate rates because it owns a Washington state refinery that uses Alaska crude. Tesoro hasn't yet decided whether to challenge the interstate rates, Brena said.

Five of the six pipeline owners have filed a lawsuit in state Superior Court asking a judge to overturn the RCA decision.

"We strongly disagree with the RCA's actions," said Daren Beaudo, a spokesman for BP Exploration (Alaska) Inc. "The (method) under which the question arose was previously approved by the state of Alaska and FERC."

A final ruling in state court could be about three years away.

STATE OF ALASKA

THE REGULATORY COMMISSION OF ALASKA

Before Commissioners: G. Nanette Thompson, Chair
Bernie Smith
Patricia M. DeMarco
Will Abbott
James S. Strandberg

In the Matter of the Correct Calculation and Use of Acceptable Input Data To Calculate the 1997, 1998, 1999, 2000, 2001, and 2002 Tariff Rates for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System Filed by AMERADA HESS PIPELINE CORPORATION; ARCO TRANSPORTATION ALASKA, INC.; BP PIPELINES (ALASKA) INC.; EXXON PIPELINE COMPANY; MOBIL ALASKA PIPELINE COMPANY; EXXONMOBIL PIPELINE COMPANY; PHILLIPS ALASKA PIPELINE CORPORATION; UNOCAL PIPELINE COMPANY; PHILLIPS TRANSPORTATION ALASKA, INC.; and WILLIAMS ALASKA PIPELINE COMPANY, L.L.C., and the Protest by TESORO ALASKA PETROLEUM COMPANY of the 1997 and 1999 Tariff Rates	P-97-4 ORDER NO. 151
In the Matter of the Petition of TESORO ALASKA PETROLEUM COMPANY for an Investigation into the Amounts Collected by AMERADA HESS PIPELINE CORPORATION; ARCO TRANSPORTATION ALASKA, INC.; BP PIPELINES (ALASKA) INC.; EXXON PIPELINE COMPANY; MOBIL ALASKA PIPELINE COMPANY; PHILLIPS ALASKA PIPELINE CORPORATION; and UNOCAL PIPELINE COMPANY for Dismantling, Removal, and Restoration of the Trans Alaska Pipeline System	P-97-7 ORDER NO. 110

ORDER REJECTING 1997,1998,1999 AND 2000 FILED TAPS RATES; SETTING JUST AND REASONABLE RATES; REQUIRING REFUNDS AND FILINGS; AND OUTLINING PHASE II ISSUES

BY THE COMMISSION:

Regulatory Commission of Alaska
701 West Eighth Avenue, Suite 300
Anchorage, Alaska 99501
(907) 276-6222; TTY (907) 276-4533

development of the state's oil resources and insuring that Alaskans have the opportunity to benefit from development of their natural resources.[7]

After prolonged litigation about the appropriate rates for shipments on the TAPS, the TAPS Carriers signed interstate and intrastate settlements with the State of Alaska. Our predecessor agency[8] accepted[9] the Intrastate Settlement[10] (the Settlement) because all affected parties supported it; the Commission did not decide that the Settlement produced just and reasonable rates. Since 1986, the TAPS Carriers calculated intrastate rates using the TAPS Settlement Methodology (TSM).[11] The Alaska Public Utilities Commission (APUC) deferred the issue of whether TSM produced just and reasonable rates until a shipper protested the rates. The 1997 Tesoro and Williams protests put that issue before us for the first time in this pipeline's twenty-year history. Under the Alaska Pipeline Act, the Carriers have the burden of proving that the rates calculated and filed using TSM are just and reasonable.

The Carriers did not support their rates with evidence showing that they reflect the costs of providing service. Instead, they assert that because the rates set by TSM are below a benchmark, the filed rates are just and reasonable. The Carriers do

[7]Alaska Const. art. VIII. The Carriers argue that a decrease in intrastate rates will result in an increase in interstate rates and the effect on the State of Alaska will be a net loss. We note that the TSM Settlement provision allowing Carriers to collect their revenue requirement from the combination of interstate and intrastate rates affords Carriers the *option* of raising interstate rates if intrastate rates decrease. The TSM Settlement agreement does not require Carriers to recover costs disallowed as unjust and unreasonable by state regulators from the federal jurisdiction.

[8]The Regulatory Commission of Alaska assumed the duties of the Alaska Public Utilities Commission on July 1, 1999. Ch. 25 SLA 1999.

[9]*Re* Amerada *Hess Pipeline Corp.*, 13 APUC 448 (1993).

[10]BWF-2, *Intrastate Settlement Agreement* (the Settlement). Endnote 1 describes record designations. A review of TAPS litigation history can be found at Endnote 2.

[11]*See* Endnote 3 for a detailed description of TSM.

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III. State of Alaska's Representations as to the TAPS Agreement.

The State approached the FERC and the APUC with the TAPS Agreement and asserted that it would be in the public interest to allow the State and the TAPS Carriers to resolve their dispute by way of the proposed settlement rather than continue time-consuming and expensive litigation. The State asked the FERC and the APUC not to consider whether the TSM ceiling rates were "just and reasonable" rates, but instead requested the TAPS Agreement be approved as a settlement that was in the public interest. The State explained to the FERC and the APUC that the TAPS Agreement only bound the signatory parties, and that the Commissions should consider the "justness and reasonableness" of future rates as though the TAPS Agreement never existed.

To cite a few examples, the State made the following representations to the APUC when the Agreement was submitted for approval:

> [T]he Commission retains full jurisdiction over intrastate TAPS tariffs; ***any non-signatory to the agreement*** (who has the requisite standing) ***may seek to challenge a tariff filed pursuant to the settlement regardless of whether the tariff complies with the terms of the settlement.***

Brief of the State of Alaska in Support of Commission Approval of the Offer of Settlement, August 7, 1986, at 3, n.1 (emphasis added).

The State also made numerous similar representations in its reply brief submitted to the APUC:

> Alaska and the TAPS Carriers have explicitly asked the Commission to approve the settlement on the basis that Petro Star, AEC and ***future shippers not be bound by the agreement's terms.***

* * *

[T]his ***Commission is absolutely free*** – as it should be – ***to establish whatever TAPS tariff rates*** it finds are consistent with the statutory requirement.

* * *

Alaska and the TAPS Carriers have not urged the Commission to approve the settlement agreement as an adjudication of "just and reasonable" rates.[2] Instead, they have urged the Commission to approve the agreement as a fair and reasonable resolution of the conflicting claims of the parties who have actively participated in this litigation for the last ten years and who will be bound by its terms.

* * *

By approving the settlement on these terms, the Commission gives those parties the benefit of their bargain, while ***fully preserving the***

---

[2] In contrast to their position in 1987, the State is now asking the RCA to treat the TSM-based rates set forth in the settlement agreement as "just and reasonable."

> Q. [H]ave you formed an opinion as to whether the TAPS Settlement tariffs are just and reasonable?
>
> A. Yes.
>
> Q. What is the basis for your conclusion?
>
> A. .... Based on my experience and knowledge, I believe the tariff rates arising from the TSM were and continue to be just and reasonable. I recommend that the Commission find them so.

Prepared Direct Testimony of Jerome E. Hass, December 10, 1998, P-97-4, at 9. See also, Motion for Leave to File Pre-Hearing Submission of the State of Alaska and Pre-Hearing Submission of the State of Alaska, P-97-4, October 8, 1998, at 3. ("The Settlement Agreements have also provided a ceiling for TAPS tariffs that ensures that such tariffs are just and reasonable.")

> ***rights of Petro Star, AEC and future shippers to seek even lower tariffs if they desire.***
>
> * * *
>
> ***[T]here is no way for the Commission to evaluate today whether future TSM rates will be "just and reasonable."*** The Commission, of course, ***retains the authority to review future settlement tariffs at the time they are filed, and make "just and reasonableness" determinations at that time.***

Reply Brief of the State of Alaska in Support of Commission Approval of the Offer of Settlement, January 15, 1987, at 4-5, 11, 15, 19-20 (emphasis added).

The APUC Commissioners were somewhat surprised to learn that the TAPS Agreement did not settle the issue of all tariffs for all parties.[3] Specifically, the Commissioners questioned the State's lawyers about the rights of shippers who were not parties to the TAPS Agreement. The State's lawyers clarified that the State had no intention of imposing the TAPS Agreement on shippers such as Tesoro who were not parties to it.

> **Commissioner Knowles:** Do you believe then that – let's say ***if a shipper were to protest the application of the settlement in five or ten years from now that it would be conceivable that the ceiling rates could be reduced at that time on the basis that they were not just and reasonable***, looking at them at that single point in time?

---

[3] The State represented to the Commission that intrastate rates for nonsignatory shippers would continue to be determined under the terms of the Alaska Pipeline Act just as it told FERC that interstate rates for nonsignatory shippers would continue to be determined under the terms of the Interstate Commerce Act. "The Settlement Agreement does not restrict the rights of any nonsignatory to challenge tariffs under the Interstate Commerce Act, ***nor could it.***" Reply Comments of the State of Alaska, April 11, 1986, FERC Docket Nos. OR 78-1-041, 042, 043, and Docket No. IS84-13-000 at 18 (emphasis added).

> **Mr. Loeffler:** Here I come. The answer is *yes*. . . . With respect to future tariffs, I think the State has consistently said that the Settlement Agreement is, in effect, a contractual mechanism for putting a cap on future tariffs. But if, for example, Petro Star thought in 1995 that the tariff filed according to the settlement cap was not just and reasonable in that particular year, then yes, Petro Star could challenge it on that basis, and indeed, if the Commission found validity in Petro Star's complaint, could lower the tariff at that time.
>
> * * *
>
> **Commissioner Agi:** But there's still a very subtle point involved here. ***There is nothing in this Agreement that binds any shipper to this proceeding***, and you just told us they're at liberty to pursue, and there is nothing here that presumably binds the Commission itself, acting through its Staff, to litigate the propriety of the proposed tariff. I would think you would have to agree with that. If not...
>
> **Mr. Maynard:** ***We believe that's correct.***

Voir Dire Examination of Dr. Horst (State of Alaska's expert witness) by Commissioners Knowles and Agi and Responses by State of Alaska outside counsel Robert Loeffler and Assistant Attorney General Robert Maynard, January 28, 1987, at 226-30 (emphasis added).

IV. TAPS Carriers' Representations as to the TAPS Agreement.

It is worth noting, that the State and the TAPS Carriers were in agreement regarding the scope and nature of the TAPS Agreement. The TAPS Carriers told the Commissions much the same thing as did the State. In their Initial Post-Hearing Brief in Support of the Offer of Settlement, the TAPS Carriers said,

> ***The Commission is not being asked to determine that TSM generates rates – either for the past or the future – that are "just and reasonable" in and of themselves.***

Initial Post-Hearing Brief of the TAPS Carriers in Support of the Offer of Settlement, March 13, 1987, at 3 (emphasis added). Similarly, the TAPS Carriers wrote,

> ***The settling parties are not asking the Commission to approve at this time the rates to be charged in 1990 and later years.*** To the contrary, as the settling parties have repeatedly stated, TSM simply sets forth voluntary rate ceilings that the TAPS Carriers have agreed not to exceed in filing their future tariffs. ***If the Staff finds that the rates set under TSM in 1995 are too high, that issue can be addressed at that time.***

Reply Brief of the TAPS Carriers in Support of Offer of Settlement, January 16, 1987, at 23 (emphasis added). Finally,

> While the Commission's legislative mandate speaks of "just and reasonable" rates, [citation] that standard must be met by the parties only when litigation results in a formal Commission decision on the merits. Where all settling parties agree on a rate structure, requiring full-scale proof would not only be unnecessary, but destructive of the settlement process.

Brief of the TAPS Carriers in Support of the Offer of Settlement, July 31, 1986, P-86-2, at 6 (citation omitted). Clearly, not even the TAPS Carriers asked the Commission to determine that TSM rates are "just and reasonable." Rather, the parties to the TAPS Agreement simply asked the Commission to let them cease litigating on the basis of their private agreement.

With regard to future rates, counsel for the TAPS Carriers, Steven Brose, told the APUC specifically that the TAPS Agreement does not prevent any nonsignatory party from challenging

TSM rates nor does it deprive the Commission of its duty and responsibility to determine just and reasonable rates. For example, Mr. Brose told the Commission,

> ***Nothing in the agreement deprives the Commission of its jurisdiction to look in the future at whether the TSM rates are unreasonably high***, nor does anything prevent any non-signor, Petro Star or Arctic Energy or whomever, from challenging those rates at any point in the future. In fact, the agreement requires that the Carriers file with the Commission every year revised tariff sheets and to provide the Commission with data sufficient to analyze the filings.

Opening Statement of Steven Brose on Behalf of the TAPS Carriers, January 27, 1987, P-86-2, at 47 (emphasis added). The TAPS Carriers also wrote in support of the offer of settlement:

> ***This agreement does not supplant this Commission's jurisdiction over intrastate rates.***
>
> * * *
>
> Other than the signatories of the agreement, ***no person is precluded from invoking the Commission's jurisdiction over TAPS intrastate rates to whatever extent that jurisdiction would exist absent the settlement.*** The Commission is thus not being asked to impose the settlement on unwilling parties with significant interests in the litigation.

Brief of the TAPS Carriers in Support of the Offer of Settlement, July 31, 1986, P-86-2, at 14 (emphasis added).

The TAPS Carriers also told the Commission that approving the TAPS Agreement between the State and the TAPS Carriers would not eliminate future TAPS tariff disputes. The TAPS Carriers made the following representations to this Commission.

> ***No other party is any worse off as a result of settlement than it would have been had the State never pursued this action in the first***

> ***place. Nor will any non-settling party be less able to invoke the Commission's remedial processes simply because the State and the TAPS Carriers have reached an agreement.***

Reply Brief of the TAPS Carriers in Support of Offer of Settlement, January 16, 1987, P-86-2, at 11 (emphasis added).

> ***If any non-signatory objects to the level of a future tariff rate, whether set within the confines of TSM or not, this Commission's processes remain available for the examination of that rate.***

Brief of the TAPS Carriers in Support of the Offer of Settlement, July 31, 1986, P-86-2, at 4.

> For the future, the intrastate settlement in essence limits the TAPS Carriers' discretion in setting tariff rates. So long as rates are set at or below ceilings calculated in accordance with TSM, the State of Alaska agrees not to challenge the rates. . . . Moreover, ***other than the signatories of the agreement, no person is precluded from invoking Commission jurisdiction over TAPS intrastate rates to whatever extent that jurisdiction would exist absent the settlement.*** The future TSM rate ceilings are the quid pro quo for the establishment of a fixed refund obligation for the past and the termination of the present litigation.
>
> * * *
>
> [B]ecause nothing in the agreement diminishes the Commission's jurisdiction, these [non-affiliated in-state] shippers ***are free to contest future rates and invoke the Commission's processes.***

Initial Post-Hearing Brief of the TAPS Carriers in Support of the Offer of Settlement, March 13, 1987, P-86-2, at 3 & 9 (emphasis added).

> The attack on the return allowance is based principally on the argument that it is not "cost-based" and therefore may result in excessive returns to the carriers in some years. This attack is both premature and misguided. It must be kept firmly in mind that ***the settling parties are not asking the Commission to approve the rates***

> ***to be charged in 1990 and later years. To the contrary, as the settling parties have repeatedly stated, TSM simply sets forth voluntary rate ceilings that the TAPS Carriers have agreed not to exceed in filing their future tariffs. If a party finds in [1995] that the rates set under TSM are too high, that issue can be addressed at that time.***

Post-Hearing Reply Brief of the TAPS Carriers in Support of the Offer of Settlement, April 3, 1987, P-86-2, at 19-20 (emphasis added).

> ***The settling parties are not asking this Commission definitively to endorse the future rate ceilings embodied in TSM.*** All the Commission is being asked to do, in order to permit implementation of the settlement, is to provide that the TAPS Carriers owe no further refunds beyond those provided in the Settlement Agreement, and therefore that the litigation regarding past TAPS tariff rates is terminated as to them.
>
> * * *
>
> ***With respect to non-settling parties, the settlement is structured to preserve in full any rights they may have to challenge TAPS rates, even if those rates are set in conformity with TSM.*** There is thus a theoretical possibility that ***a non-settling party might seek to institute new litigation in the future.***
>
> * * *
>
> ***No party – or non-party – is one penny worse off as a result of this settlement than it was before the settlement.*** TSM merely sets ceilings on the rates it is permissible for the TAPS carriers to file in the future. Within those ceilings, the rates still remain subject to Commission jurisdiction. ***Any party (other than the State) believing a rate is too high remains free to seek such relief as is available under governing law.*** Thus, while this settlement is primarily intended to be for the benefit of the parties to it, non-parties get the best of both worlds. They are the beneficiaries of the TSM ceilings, which limit the rates the TAPS carriers can set, while ***they sacrifice none of their rights that otherwise exist.***

Prepared Direct Testimony of Richard Hildahl on behalf of the TAPS Carriers, July 31, 1986, P-86-2, at 6, 10, 12-13 (emphasis added).

> [O]ne of the things that could indeed happen is that you agree to the Settlement, that the day you accept the Settlement, that a small shipper, or one of the participants here, files a complaint and says, "We do not believe that the tariffs currently are just and reasonable and we're into that process," but that's there whether or not you accept the Settlement.... [Y]our job does not go away. I personally believe it will be made easier if you accept the settlement. But ***there could be substantial proceedings in the future in front of this Commission with respect to disputes on the just and reasonableness of the tariffs on the pipeline.***

Response of Mr. Richard Hildahl (the TAPS Carriers' expert witness) to Voir Dire by Commissioner Knowles, January 29, 1987, P-86-2, at 391-92 (emphasis added).

V. By its Terms, The TAPS Agreement may not be Applied to Intrastate Shippers or Their Interstate Rates.

By its own terms, the TAPS Agreement may not be applied to nonsignatory parties. Section III-4 of the TAPS Agreement provides:

> Parties in Interest: This Intrastate Agreement shall be binding upon and inure solely to the benefit of the parties and their respective successors and assigns, including lessees. No obligation under this Intrastate Agreement shall be for the benefit of or be enforceable by any third party.

Intrastate Settlement Agreement at 19. Such an Agreement by its terms should not be applied to prevent this Commission or Tesoro, who is not a signatory, from exercising its rights under the Alaska Pipeline Act.

VI. APUC's Understanding of the State's and the TAPS Carriers' Representations.

In its 1987 approval of the TAPS Agreement, the Commission specifically reserved its right to adjudicate future TAPS rates. The Commission wrote:

> The settlement as explained by its proponents at the hearing and in their written submissions is acceptable because it is the ***Commission's understanding that it allows for continued adjudication of TSM as a basis for deriving current and prospective rates***; permits finalization of past period rates with liquidation of related refund obligations; and establishes ceilings on future rates which are specifically enforceable by this Commission.

APUC Order No. P-86-2(14) at 2 (emphasis added). In other words, the Commission resolved TAPS tariff issues for the past by terminating the proceeding but left open all TAPS rate issues since 1986.[4]

Further, in light of Petro Star's protest of intrastate TAPS tariffs, the Commission expressed its intention to investigate and take whatever action it deemed necessary to adjudicate just and reasonable rates.

> The Commission will first complete its investigation of the acceptability of using TSM to derive present and future rates. . . . If the Commission determines that TSM does not produce just and reasonable results or is not otherwise an appropriate methodology to be used in the calculation of intrastate TAPS rates, the Commission will proceed to fully adjudicate rates from July 11, 1986, forward. With respect to that adjudication, ***the Commission is entirely free to set just and reasonable rates according to whatever methodology the Commission finds to be appropriate for the regulation of TAPS.***

APUC Order No. P-86-2(14) at 5 (emphasis added).

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[4] According to the Commission, **"The signatories have stipulated that the Commission is free to adjudicate the acceptability of TSM rates prospectively."** APUC Order No. P-86-2(14) at 2 (emphasis added).

When the TAPS Carriers settled with Petro Star in 1993, the Commission noted its intention to terminate the investigation under 3 AAC 48.090(d)(2). Even then, the Commission was careful to note, however, that all rates since 1986 would remain suspended subject to refund, that each annual rate is considered a new tariff filing, and that all issues remain to be adjudicated despite the Commission's acceptance of the TAPS Agreement.

> Notwithstanding the acceptance of the TAPS Settlement, ***the suspension of 1986, 1987, 1988, 1989, 1990, 1991, 1992, and 1993 TSM rates will not be vacated*** until the Commission determines that those filed rates were correctly calculated under the TSM and include acceptable input data.
>
> ***Each new rate filed by the TAPS Carriers under the Intrastate Settlement Agreement is considered to be a revised tariff filing under AS 42.06.400. The filing is subject to the same standards and procedures to which it would have been subject if the Intrastate Settlement Agreement had not been accepted.*** However, in the absence of a protest, the TAPS Carriers need not file the supporting material required by 3 AAC 48.275(a). Instead, the TAPS Carriers should file the TSM computer disk used in calculating the rate filed and a hard-copy printout of the rate calculation.
>
> ***The Commission's acceptance of the TAPS Settlement should not be construed as determining any issue which was raised in Docket P-86-2 or in the underlying TAPS litigation Dockets.***

APUC Order P-86-2(41) at 20-21 (emphasis added).

As can be seen, then, the Commission did not "approve" the TSM for resolving intrastate rates issues or "approve" the TSM to be used as a methodology to set just and reasonable rates under the Alaska Pipeline Act. To the contrary, it allowed the signatory parties to resolve their disputes and terminated the investigation into rates prior to 1986 and nothing more. Finally, reflecting a clear

understanding of the terms of the Agreement, the APUC approved the deal precisely because it allowed for continued adjudication of rates as to non-parties.

> The settlement as explained by its proponents at the hearing and in their written submissions is acceptable because it is the ***Commission's understanding that it allows for continued adjudication of TSM as a basis for deriving current and prospective rates***; permits finalization of past period rates with liquidation of related refund obligations; and establishes ceilings on future rates which are specifically enforceable by this Commission.

APUC Order No. P-86-2(14) at 2 (emphasis added).

LEXSEE 35 f.e.r.c. 61,425

Trans-Alaska Pipeline System

Sohio Pipe Line Company

Docket Nos. OR78-1-041, OR78-1-042 and OR78-1-043;

Docket No. IS84-13-000

FEDERAL ENERGY REGULATORY COMMISSION - Commission

35 F.E.R.C. P61,425; 1986 FERC LEXIS 1582

Order Approving Settlement, Granting Application, Affirming Initial Decision, and Terminating Dockets

[Note: Initial Decision of the Presiding Administrative Law Judges, issued April 23, 1986, appears at 35 FERC P63,027.]

June 27, 1986

SYLLABUS:
[**1]

[Note: Initial Decision of the Presiding Administrative Law Judges, issued April 23, 1986, appears at 35 FERC P63,027.]

PANEL:

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

OPINION:
[*61,976]

On October 23, 1985, the Commission approved a Settlement Agreement between the State of Alaska (Alaska) and six of the eight TAPS owners - ARCO Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, and Union Alaska Pipeline Company (now Unocal Pipeline Company). n1 As to the nonsettling parties, the Commission remanded the proceeding to the administrative law judges (ALJs) "to enable the nonsettling parties to discuss at a hearing the settlement issues they have raised only as those issues apply to them." n2 The Commission also directed the ALJs to transmit an initial decision to the Commission within six months of the order of October 23, 1985. n3 On December 19, 1985, the Commission denied the Arctic Slope Regional Corporation's (Arctic) request for rehearing. n4 The Commission reiterated the above-quoted language and further stated that "Arctic is afforded an opportunity to [**2] raise its issues at a hearing." n5 In December 1985, the ALJs held a hearing and received evidence filed by Arctic and by the Alaska Public Interest Research Group (AkPIRG). Thereafter, the ALJs received initial briefs from the Sohio Pipe Line Company (Sohio), Amerada Hess Pipeline Corporation (Amerada Hess), AkPIRG, Arctic, and Alaska and a reply brief from Sohio. On April 23, 1986, the ALJs issued their initial decision as directed by the Commission. n6 The ALJs concluded that "the Commission does not have the authority, under the facts of the remanded proceeding, to impose the settlement on the objecting parties." n7 On May 23, 1986, Arctic filed a brief on exceptions to the initial decision. On June 6, 1986, Alaska, Sohio, and the six original settling owners filed briefs opposing Arctic's brief on exceptions. On June 13, 1986, Amerada Hess filed a brief opposing Arctic's exceptions.

n1 *33 FERC P61,064, reh'g denied. 33 FERC P61,392 (1985).*

n2 *33 FERC P61,064. at p. 61,140 (1985).*

n3 *Id. at pp. 61,140-41.*

n4 *33 FERC P61,392 (1985).*

n5 *Id.* at p. 61,757.

n6 *35 FERC P63,027 (1986).*

n7 *Id.* at p. 65,076.

The six original settling TAPS owners [**3] also moved to intervene on June 6, 1986, for the limited purpose of replying to Arctic's brief on exceptions. The six original settling owners filed their motion on the ground that they were not parties to the settlement remand pro-

ceeding. On June 16, 1986, Arctic filed an answer in opposition to the six original settling owners' motion to intervene. Because the six original settling owners are parties to the [*61,977] overall TAPS proceeding, we see no reason to rule on their motion to intervene or Arctic's answer in opposition. Accordingly, the reply of the six original settling owners is accepted.

Amendment to Settlement Agreement

On March 12, 1986, Alaska filed with the ALJs an amendment to the Settlement Agreement (Amended Settlement Agreement) pursuant to which Amerada Hess and Sohio entered into and agreed to be bound as parties to the Settlement Agreement. The Commission's trial staff and the United States Department of Justice (Justice) support the Amended Settlement Agreement. Arctic opposes the *Amended Settlement Agreement. On April 15, 1986 [35 FERC P63,018]*, the ALJs certified the Amended Settlement Agreement to the Commission.

Because the Amended Settlement Agreement is identical [**4] in all material respects to the Settlement Agreement approved by the Commission in its order of October 23, 1985, it is not necessary to again set forth the terms and provisions of the agreement. n8

n8 The terms are set forth at *33 FERC P61,064*, pp. at 61,138-39. The Amended Settlement Agreement specifies maximum interstate tariffs for Amerada Hess and Sohio for 1986 of $4.49 for Sadlerochit reservoir and $4.60 for Kuparuk reservoir petroleum.

As discussed below, the Commission finds that since it is not imposing the settlement on Arctic, Arctic's interests are not affected by it. Accordingly, its opposition to the settlement is moot. Since the result of the settlement does not present any current, genuine, material issues, we may dispose of the matter before us by treating the Amended Settlement Agreement as an uncontested settlement. In its order of October 23, 1985, the Commission exhaustively discussed why approval of the Settlement Agreement was fair and reasonable and in the public interest. n9 Likewise, the Commission finds that the Amended Settlement Agreement is fair and reasonable and in the public interest for the reasons given in the order of October 23, 1985.

n9 *33 FERC at pp. 61,139-40.* [**5]

Initial Decision and Arctic's Exceptions Thereto

In their initial decision on remand, the ALJs concluded that the settlement could not be imposed on objecting parties by the Commission. n10 On May 23, 1986, Arctic filed a brief on exceptions to the initial decision. Arctic agrees with the ALJs' conclusion that the settlement cannot be imposed on objecting parties, including Arctic. Despite Arctic's satisfaction with the ALJs' conclusion, it excepts to several of their statements. Arctic objects to the ALJs' statement that two of its witnesses "essentially merely echo the comments made in connection with [Arctic's] opposition to the six-carrier settlement proposal" n11 and to their statement that "if approved [the instant settlement] effectively would terminate the pending rate proceedings with respect to the transportation of oil by all eight carriers who own individual interests in TAPS" n12 and "will terminate these proceedings as far as the Commission is concerned." n13 Arctic argues that the Commission may not lawfully dismiss its protest over its objection unless the Commission establishes just and reasonable rates. We discuss each of Arctic's specific contentions in turn. [**6]

n10 *35 FERC P63,027, at p. 65,076.*

n11 *Id.* at p. 65,075.

n12 *Id.*

n13 *Id.*

Arctic argues that approval of the settlement and dismissal of its protest will in effect impose the settlement on it. It claims that such action would not comport with Rule 602(g) of the Commission's Rules of Practice and Procedure which governs uncontested settlements, n14 the decision of the United States Court of Appeals for the District of Columbia Circuit in *United Municipal Distributors Group v. F.E.R.C. (United)*, n15 and our recent order in *Northern Natural Gas Co. (Northern)*. n16 We disagree. We are not imposing the settlement on Arctic either directly or indirectly. n17 Therefore, in accordance with the Commission's regulations, we may treat the settlement as uncontested. Hence, we may approve the settlement pursuant to Rule 602(g) as fair and reasonable and in the public interest.

n14 18 C.F.R. § 385.602(g) (1985).

n15 *732 F.2d 202 (D.C. Cir. 1984).*

n16 *35 FERC P61,105 (1986).*

n17 Approval of the settlement does not in any way affect Arctic's rights. If Arctic wishes to litigate just and reasonable rates, Arctic will have the opportunity to do so in the future. This is because under the terms of the settlement, specifically Section I-4, the TAPS carriers will make annual filings of the maximum interstate tariffs. We view these filings as rate filings under the ICA, and Arctic will have the opportunity to protest these filings as it would any rate change filing under the ICA. The burden of showing that the new rate is just and reasonable will be on the TAPS carriers, pursuant to section 15(7) of the ICA which provides that in any "hearing involving

a change in rate . . . the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable . . ." The carriers cannot rely on the approved settlements to establish the justness of these filed rate changes, since the settlement rates were never adjudicated to be just and reasonable. [**7]

Moreover, in our view, our action comports with the holdings in both *United* and *Northern*. In both cases, the settlement was not imposed on the objecting party. Here, also, we are *not* imposing the settlement on Arctic. Arctic is not in any way bound by the settlement. As observed by the six original settling owners in their briefs, the settlement in no way limits Arctic's legal remedies. Hence, the procedure endorsed by the court in *United* of both preserving the bargain of the settling parties and also protecting the rights of non-consenting parties has been utilized. While it is true that in *United* and *Northern* the objecting parties were entitled to an immediate hearing on the merits, this was because those parties had immediate interests as customers *(United)* and a state commission *(Northern)*.

It is most ironic that Arctic argues *United* as support for its position. The Commission correctly interpreted *United* as judicial approval for the approach adopted in its October 23, 1985 order. The court in *United* expressly negated the precise arguments presented by Arctic, including the novel concept of being "settlement bound," where the court stated [**8] that "where a settlement is reasonable, we think it could not be coercion to leave a party who declines to join it to his legally prescribed remedies." n18 The court spoke in terms of permitting a non-settling [*61,978] party to preserve its objection, while allowing the settling parties to have the benefit of a settlement found by the Commission to be fair and reasonable and in the public interest. The court stated that the Supreme Court's opinion in *Mobil Oil Corp. v. F.P.C., (Mobil) 417 U.S. 283 (1974)* and this Commission's regulations support that approach. The court also emphasized that *Mobil* and other precedent recognize that settlements of rate proceedings are to be encouraged, and the Commission's action in the *United* case "serves this salutary policy by preserving a settlement for all non-objecting parties and by also permitting [the objecting party] to preserve its objection." n19 The court found nothing in Mobil to preclude the Commission from taking that action. The approach adopted in the October 23, 1985 order is supported clearly and categorically by the court's analysis and opinion in *United*.

n18 *United* at 210 n. 12.

n19 *United* at 209.

The Commission [**9] has been faithful to both the letter and the spirit of the court's opinion and guidance in *United* by providing Arctic a full opportunity to preserve its objections to the settlement and pursue its legally prescribed remedies separately, while preserving the benefits of the settlement for the settling parties. Since the ALJs first certified the original settlement as to the six owners, Alaska and Justice in August 1985, the Commission has provided Arctic the procedural opportunity to establish its standing to contest the settlement, to challenge the Commission's procedures in considering the settlement and to make a record of its substantive analysis and objections to the settlement. Arctic's concerns were not and have not been unceremoniously dismissed out of hand by the Commission. Quite the contrary, the Commission has sought at each step of the TAPS settlement proceeding to ensure Arctic's full procedural due process, consistent with *United*, to pursue its legally prescribed remedies. As the Commission stated in its October 23, 1985 order:

The Commission will approve the settlement with respect to the settling parties because it is fair and reasonable and in the public interest. [**10] The settling parties have fashioned an innovative methodology which achieves their respective aims in this proceeding. The settlement is a comprehensive, long-term settlement of complex issues in a hotly contested, lengthy and expensive proceeding. Such settlements necessarily involve compromises by the parties from their litigation positions. Otherwise, settlements such as this one, which are to be encouraged and which are in the interests of this Commission, the regulated companies, their customers, other parties such as Alaska and Justice, and the public would not be possible. The Commission strongly believes the settling parties are entitled to the benefits of their bargain and to not adopt the settlement would be contrary to the public interest.

Nonetheless, the Commission acknowledges the concerns of the nonsettling parties and shall remand the proceedings with regard to them to the administrative law judges to allow the nonsettling parties a hearing only on those issues which apply to them. n20

n20 *33 FERC at p. 61,140*

In footnote 17, to the order of October 23, 1985, the Commission reiterated its intent that the remand of the proceedings would "enable the nonsettling parties [**11] to air their objections at a hearing." and "the Commission is not at this time imposing the terms of the Settlement Agreement on any nonsettling party." n21 Subsequently, in denying rehearing of that order, the Commission further addressed the concerns of Arctic in its order of December 19, 1985:

n21 *Id. at p. 61,141*.

Additionally, Arctic presents a summary of the settlement's alleged deficiencies to bolster its request for rehearing. However, the Commission has given Arctic a forum in which to present these arguments. The order of October 23, 1985, allows Arctic to air its specific objections to the Settlement Agreement at the hearing on remand as those issues apply to it. n22

n22 *33 FERC at p. 61,757.*

Our commitment to provide Arctic with a full opportunity to address these issues has not been without opposition. Despite the concerted efforts of some of the settling parties, we have remained steadfast in our resolve to provide Arctic that opportunity and have stayed the course on completing the remand proceedings without any deviation from our regular procedures. Shortly after the ALJs certified to the Commission the Amendment to the Original Settlement, Alaska petitioned [**12] the Commission to abandon the regular procedures which would otherwise apply to the remand proceedings and to substitute expedited briefs and reply briefs by the parties concerning the disposition of any relevant matters in lieu of an Initial Decision by the ALJs and subsequent submission of briefs on exceptions and reply briefs. n23 Alaska argued that the substituted approach was appropriate in light of the settlement amendment by the two remaining owners and was necessary because the terms of that settlement allowed any party to withdraw from the agreement if the Commission did not approve the settlement by May 31, 1986. Consequently, Alaska argued, the Commission was compelled to adopt the substitute procedure to complete final action by May 31 and thereby insure that no party would [*61,979] withdraw from the settlement. We set an expedited schedule for briefs commenting on Alaska's petition. n24 Arctic strenuously objected to Alaska's proposal and urged that the Commission to proceed with an Initial Decision. Arctic presuasively argued that there was "no good reason to grant the requested relief" and that Arctic "cannot lawfully be deprived of the benefit of the closed settlement remand [**13] record that was created principally by [Arctic] at considerable expense and effort pursuant to the Commission's October 23, 1985, order." n25 Almost all of the settling parties submitted comments supporting Alaska's petition which was also supported by the Commission's trial staff. Ultimately, the Commission took no action on Alaska's petition and on April 14, 1986, Alaska withdrew the petition, stating that the motion had "precipitated an unnecessary confrontation with [Arctic] which preceives, incorrectly, that it will lose some substantive or technical advantage from the motion." n26 While Alaska eventually withdrew its petition in the face of Arctic's opposition and the Commission's inaction, it is quite obvious that Alaska's substitute approach would have significantly narrowed the substantive scope of our consideration of the issues in the remand proceeding, limited the submissions of the parties accordingly, and imposed a much shortened schedule for our consideration of these matters.

n23 Motion of Alaska to Establish Procedures for the Expeditious Resolution of the Present Proceeding filed on March 24, 1986.

n24 *See*, Order Limiting Time to Answer Motion, issued March 27, 1986. [**14]

n25 Opposition of Arctic Slope Regional Corporation to Motion of Alaska, filed March 31, 1986, at 1, 2.

n26 Notice of Withdrawal by Alaska, filed April 14, 1986, at 1.

Ultimately, the ALJs rendered an Initial Decision in the remand proceedings on April 23, 1986, and there has been no deviation from the subsequent briefing schedule under our regulations, despite the pleadings of the settling parties or our action and the passage of the May 31, 1986, deadline, which was imposed by the settlement. The Initial Decision concluded that the Commission does not have the authority under the facts of the remanded proceeding to impose the settlement on the objecting parties. n27 Arctic, in fact, has relied repeatedly on that conclusion in its pleadings. n28

n27 Text at footnote 7 above.

n28 *See e.g.*, Arctic's Brief on Exceptions to Initial Decision at 6.

As it sought in its opposition to Alaska's petition, Arctic has had a full opportunity to pursue all of its objections to the settlement in the context of the remand proceedings. Arctic, in a pleading filed June 16, 1986, has acknowledged that fact, as follows:

In summary, the Commission's purpose in ordering the settlement [**15] remand hearing was to:

allow . . . [Arctic] to air its specific objections to the settlement agreement at the hearing on remand as those issues apply to it.

33 FERC (CCH) P61,392 at 61,757. Because the settlement remand hearing was the first and *only evidentiary* opportunity Arctic ever has had to address the principal defects in the settlement as those issues affect Arctic's interests, Arctic, at great cost and subject to what Arctic believed to be improper and unfair strictures of the Administrative Law Judges, took that opportunity seriously and prepared and presented detailed testimony of highly qualified expert witnesses on specific aspects of the settlement that have an immediate, continuing and highly detrimental impact on Arctic's very specific interests as a

landowner and prospective shipper. n29

n29 Answer of Arctic in opposition to motion of six original settling owners to intervene, filed June 16, 1986, at 8, 9.

Consequently, we are confident that Arctic has had the fullest possible procedural due process in the remand proceedings. Arctic has been provided a formal hearing at which to preserve its objections and pursue its legal remedies. Arctic, as it has acknowledged, [**16] has taken full advantage of that opportunity. The efforts of Alaska to limit the substantive scope and procedural approach of the remand proceedings, opposed strenuously by Arctic, were unsuccessful. The Initial Decision before us has been the subject of full briefing on exceptions and in reply briefs by all participating parties. The Commission, as a result, has satisfied the Court's guidance in *United* by procedurally allowing Arctic to preserve its objections and pursue its legal remedies through the full remand process, which it has done. The court in *United*, however, did not conclude that the Commission had a further obligation, beyond the procedural preservation of objections and pursuit of legal remedies, to grant the specific relief sought by a non-settling party, independent of the substantive results of the procedural opportunity to provide for such preservation and pursuit. For example, Arctic, citing the *United* opinion cannot both accept the conclusion resulting from the remand proceedings that it is not bound by the settlement, and demand that the Commission either reject the settlement or, in the alternative, modify the settlement with five specific modifications, [**17] which substantially alter the settlement, as a condition to its withdrawal of opposition to the settlement. n30 Our substantive conclusions of fact and law must and will reflect the complete record before us, including the remand proceedings, pursuant to *United*. As a result, our approach will have afforded Arctic every procedural opportunity under our rules to proceed with such preservation and pursuit in seeking its requested substantive result in full satisfaction [*61,980] of *United*. It is in that regard that Arctic has misconstrued our action under *United* in the *Northern* case.

n30 Arctic's Brief on Exceptions filed May 23, 1986, at 13, 14.

We were persuaded on rehearing in *Northern* by the arguments of the Iowa State Commerce Commission (ISCC) that it was bound by the settlement remedy, because the Commission in approving the offer of settlement, including specific refunds, without modification had precluded itself, in fact, from ordering the further refunds sought by ISCC. ISCC argued that the Commission therefore could not consider any other result in the remand proceedings involving only ISCC and order further refunds. In effect, ISCC argued it was bound by the [**18] settlement, because the Commission under applicable precedent could not order *any* further refunds ISCC sought upon conclusion of the original remand proceedings. Furthermore, the settlement in *Northern*, if approved, would have resolved the issue of *past* gas purchasing practices by the pipeline challenged by ISCC and required *current* refunds and *immediate* action by the pipeline, which would be of *clear* and *present* concern to ISCC and Iowa consumers. Consequently, we were persuaded that approval of the settlement there with a separate remand for ISCC would foreclose as a matter of law the further consideration of the gas purchasing practices issue and the additional refunds. Our conclusions and decision in *Northern* turned solely on the issue of whether approval of the settlement would prevent the further immediate refunds sought now by ISCC. Arctic quite simply does not stand in the shoes of ISCC substantively or procedurally, and as a result, our decision in *Northern* does not apply to the instant case. Furthermore, as we stated in our October 23 order, "the Commission strongly believes the settling parties are entitled to the benefits of their bargain [**19] and to not adopt the settlement would be contrary to the public interest." n31 Failure to adopt the settlement would also be completely contrary to the approach in *United*.

n31 *33 FERC at p. 61,140.*

Arctic claims that dismissal of its protest will violate the Interstate Commerce Act (the Act) which requires that the Commission issue a decision on the merits. The Commission agrees with Arctic that section 14(1) of the Act requires it "to make a report in writing . . . which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises." n32 We do not agree that the report must be on the merits. While the Supreme Court stated that the report "deals with the merits," n33 the appellants before the Court were aggrieved. n34 As we shall discuss below, Arctic is not at the present time aggrieved by the settlement. Under these circumstances, we believe that this order complies with the requirements of section 14(1) of the Act.

n32 *49 U.S.C. § 14*(1) (1976).

n33 *City of Chicago v. United States, 396 U.S. 162, 166 (1969).*

n34 *Id. at 163.*

Arctic further cites our recent order in *Southern Pacific Pipe Lines, Inc.* [**20] n35 for the proposition that we may not approve the settlement as uncontested and dismiss its protest. In that order, we stated that "section 15(7) of the Interstate Commerce Act requires that changed rates be just and reasonable" and that we can approve contested settlements that "establish just and rea-

sonable rates." n36 Here, we are dealing, as aforesaid, with an uncontested settlement, not applicable to Arctic, which involves initial rates filed in 1977. Such uncontested settlements may be approved if they are fair and reasonable and in the public interest. n37 Both on October 23, 1985 and in this order, we find this settlement to be fair and reasonable and in the public interest.

n35 *35 FERC P61,242 (1986).*

n36 *Id.* Slip Op. at 3.

n37 18 C.F.R. § 385.602(g)(3) (1985).

Arctic also argues that its testimony demonstrates the disastrous financial consequences it will suffer if the settlement is approved. We shall address Arctic's contentions regarding its pecuniary interests in TAPS rates in the next section of this order.

In Arctic's June 16, 1986, answer in oppostion to the motion of the six original settling owners to intervene, Arctic states that it has spent [**21] over $2 million establishing an evidentiary record in this proceeding. Arctic complains that dismissal of its protest would force it to start from scratch in some future proceeding for which the present presiding ALJs might not be available. The evidentiary record made in this proceeding will be available to Arctic in the future. To the extent that the present record is material and relevant to the issues raised in any future proceeding, Arctic and any other participant in the present proceeding may request incorporation of the present evidentiary record into the record of the future proceeding. Moveover, if at all possible, we will try to have one or both of the present presiding ALJs assigned to any future proceeding.

To conclude, we affirm the conclusion of the ALJs that the settlement may not be imposed on any objecting party, including Arctic, and affirm the initial decision. n38

n38 Sohio observes in its reply that the initial decision has given Arctic what it sought: no imposition of the settlement on Arctic.

Arctic is Not Aggrieved by the Settlement

It is uncontested that Arctic is a party to this proceeding. However, no party may automatically create a genuine, material [**22] issue in a settlement merely by its opposition to the settlement. As the Commission has stated:

> If a party's interests are not *immediately and irreparably affected* by approval of a settlement . . . , that party's opposition to a [*61,981] settlement does not create a genuine, material issue. n39 (Emphasis added).

n39 *El Paso Natural Gas Co., 25 FERC P61,292, at p. 61,673 (1983).*

Arctic must be particularly "aggrieved" by the settlement in order to legitimately challenge the settlement on the merits. The courts have fashioned a test to determine judicial standing which we think is appropriate in this context as well. The test is whether a party "has sustained an injury *in fact* to an interest arguably within the zone of interests protected or regulated by the [Interstate Commerce Act]." n40 (Emphasis added).

n40 *ANR Pipeline Co. v. F.E.R.C., 771 F.2d 507, 515 (D.C. Cir. 1985); National Treasury Employees Union v. United States Merit Systems Protection Board, 743 F.2d 895, 910 (D.C. Cir. 1984).*

Whether Arctic is aggrieved must be determined on the basis of the specific facts of this proceeding. As the United States Court of Appeals for the District of Columbia Circuit [**23] has stated, this requires:

> not only present and immediate harm, but also a "looming unavoidable threat" of harm. In other words, it is sufficient . . . if a party has an "immediate prospect of future injury." n41

n41 *ANR Pipeline Co. v. F.E.R.C., 771 F.2d 507, 515-16 (D.C. Cir. 1985)* (citation omitted).

Such aggrievement "must be present and immediate." n42 Therefore, Arctic's injury must be real, not speculative, and "must be 'immediately pressing.' " n43

n42 *Cincinnati Gas & Electric Co. v. F.E.R.C., 246 F.2d 688, 694 (D.C. Cir. 1957).*

n43 *Id.*, quoting *Eccles v. Peoples Bank, 333 U.S. 426, 432 (1948).*

At present, Arctic neither ships oil through TAPS nor does it have a royalty interest in any oil being shipped via TAPS. It has no direct present interest in TAPS' rates. Arctic informs us that it has interests in probable and possible [oil] reserves on the Alaskan North Slope (ANS) and the oil in which it has a royalty interest will be shipped over TAPS soon. At best, the record indicates this shipment *may* occur in the early to mid-1990's. n44 This contingent, potential future interest is not so present and immediate to justify allowing Arctic to [**24] raise this proceeding to the level of a contested settlement. The prospect of any injury is not only not immediate but may not occur, if it occurs at all, until the 1990's. n45

n44 Prepared Direct Testimony of Thomas E. Kelly on behalf of Arctic at 9.

n45 As Alaska and the six original settling owners observe in their replies, the recent plunge in the world price of oil makes it questionable whether Arctic's re-

serves will ever be developed. *See* Oil and Gas Journal 43, 46, 48 (March 31, 1986).

Arctic also claims that an excessive TAPS rate will reduce the value of its land and its crude oil resources by reducing the wellhead value of ANS oil. Arctic argues that this will reduce its lease revenues from potential bidders by reducing bids and bonus payments it will receive in lease negotiations. While we recognize that potential bids and bonus payments are of legitimate concern to Arctic, we observe that potential offers of any bids and bonus payments are not linked to the TAPS settlement rates, since they do not apply to Arctic. Logically, potential offers must be concerned with TAPS' rates when and if the ANS oil starts flowing at some future date. As the record indicates, [**25] the earliest projection for potential shipment of any of this oil is in the 1990's. Hence, we cannot agree that our approval of this particular settlement and the setting of rates thereunder will have any particular linkage to Arctic's future bids and bonus payments, if any, because the settlement doesn't set rates for Arctic's oil. The settlement only establishes a maximum tariff which contains elements such as rate of return, capital structure, and a $0.35 per barrel charge starting in 1990. As in any rate case, such items are subject to change. In addition, as observed by the six original settling carriers in their reply, TAPS' rates in the 1990's will be based on cost-of-service data and throughput estimates for the rate year in question. Current cost data and hypothetical throughput estimates are irrelevant to rates in the 1990's. In light of the foregoing, we conclude that the settlement will not cause any real harm to Arctic's potential bids and bonus payments either now or in the future. n46

n46 For the same reasons, bidders' decisions to bid at all and lessees' decisions to develop will not be affected by the settlement.

We conclude that Arctic has not shown any present [**26] or immediate harm or demonstrated any "immediate prospect of future injury" to its interests. n47 It will not have an interest in any oil shipped through TAPS until the 1990's, if then. n48 Moreover, as we discussed above, we fail to see how the settlement will have any impact on Arctic's bids and bonus payments either at present or in the future.

n47 Arctic asserts that the ALJs in their initial decision acknowledged that:

> The TAPS tariffs affect the economics of the leases that [Arctic] can negotiate and they determine whether some marginal properties can be leased at all or will be developed. *(35 FERC at 65,075).*

We read the ALJs' initial decision as merely stating, without adopting, the above testimony. In any event, for the reasons given in the text, we have concluded that the TAPS settlement tariffs do not affect the negotiation of Arctic's leases or the development of its properties. Despite Arctic's allegation that its witnesses presented evidence of present economic harm, for the reasons given above, we reject Arctic's analysis.

n48 *See* n. 45, *supra.*

In response to numerous allegations, we categorically state that our approval of this settlement is not a [**27] precedent as to future TAPS' rates. As a non-settling party, Arctic will simply not be bound by the settlement. By approving the settlement we are making no determinations adverse, prejudical, or precedential to Arctic's interests. Moreover, the settlement merely sets maximum tariffs. It does not preclude lower future tariffs. Indeed, we think the knowledge that there is a cap on TAPS' rates may well aid the developers of ANS oil in their decision-making processes and should, as both Alaska and Justice believe, encourage the development of ANS oil. n49

n49 *33 FERC at p. 61,139.*

In summary, we conclude that Arctic has not, at this time, raised a genuine, material issue sufficient to constitute a contested settlement. n50 There are no persuasive arguments in Arctic's brief which compel a different result. n51 To determine, as Arctic would have us do, that the Commission may not terminate a rate proceeding merely because a proceeding has begun, is erroneous. To conclude otherwise would require the Commission to routinely proceed in cases where there is no actual case or controversy. Congress could not have intended such a result. The Commission may take any appropriate action in [**28] any proceeding, at any time, including termination, as long as the parties have had a fair opportunity to present [*61,982] arguments and relevant evidence. Arctic has been given that opportunity. The Commission has no further obligation other than to state the rationale for its decision, as it does in this order.

n50 Accordingly, we also see no reason to modify the settlement as Arctic requested both in its brief on exceptions and initial comments on the settlement.

n51 Arctic observes that Section 13 of the Interstate Commerce Act forbids the dismissing of complaints "because of the want of direct damage," *49 U.S.C. § 13*(2) (1976). *ICC v. Baird, 194 U.S. 25, 39 (1903).* That section merely recognizes the possibility of indirect damage. However, it in no way bars a dismissal where, as here, there is *no* immediate damage.

Consequently, we approve the settlement, and terminate the proceeding without prejudice. n52 As recommended by the ALJs in their initial decision, we do not

impose the settlement on Arctic nor is Arctic bound by our approval of the settlement. If, and when Arctic is actually aggrieved, it may contest TAPS' rates, including requesting reconsideration of our approval [**29] of the pooling agreement, *infra*, by filing a complaint or protest to a rate filing. n53 Furthermore, our approval of the Amendment to the TAPS Settlement Agreement here, and indeed our approval of the prior TAPS Settlement Agreement under our order of October 23, 1985, does not in any way limit or modify any of the rights of Arctic under the Interstate Commerce Act with regard to the terms, conditions and operation of the settlement. n54 To that extent, the respective procedural rights of Arctic and Alaska should not differ materially, despite Arctic's stated concerns to the contrary. Additionally, Arctic, as well as any entity which is not a party to the settlement, may file at any time in the future for an adjudicated rate, which does not exceed the settlement rate, under the holding of *Sea-Land Service, Inc. v. ICC.* n55 Finally, while we will not here so condition our approval of the settlement, we encourage all of the parties to the original TAPS Settlement Agreement and the Amendment to the TAPS Settlement Agreement to seek a negotiated settlement at the earliest possible time with regard to Arctic's recoupment of litigation expenses in the proceedings before this Commission, [**30] paralleling the recoupment of Alaska's litigation expenses.

n52 AkPIRG did not contest the instant settlement. It did oppose the settlement between Alaska and the initial group of six settling TAPS owners. Because we are terminating the dockets herein, we shall address whether AkPIRG may oppose the settlement approved by the Commission in its order of October 23, 1985. AkPIRG states that it is a citizen group organized to represent the interests of consumers and taxpayers before government agencies, and consequently it is interested in TAPS' rates as those rates impact on Alaska's taxes and royalties. But a mere interest in those rates is not enough to render AkPIRG aggrieved. *Sierra Club v. Morton, 405 U.S. 727, 739 (1972).* AkPIRG must have a "particularized injury that sets [it] apart from the man on the street." *United States v. Richardson, 418 U.S. 166, 194 (1974)* (Powell, J., concurring). We see no such injury here, either direct or indirect. Hence, we find AkPIRG's interest insufficient to result in a contested settlement.

n53 Alaska agrees that "by not imposing the settlement on [Arctic], the Commission will fully protect whatever rights [Arctic] has under the Interstate Commerce Act to seek future tariffs even lower than those filed by the TAPS Carriers pursuant to the settlement" (Brief opposing Arctic's exceptions at 5). The six original settling owners are in accord that Arctic has "the legal right to challenge rates filed by the TAPS carriers even if those rates comply with the ceiling established by [the settlement]." (Reply to Arctic's brief on exceptions at 18, 19). [**31]

n54 In its reply, Alaska questions whether the continuation of the present proceeding would serve any useful purpose, especially for Arctic. Alaska observes that Arctic has no interest in any refunds because it has never shipped oil through TAPS, that actual cost-of-service data exists in the record only through 1981, that the proceeding may be affected by our opinions in *Williams Pipe Line Co., 31 FERC P61,377 (1985)* and *33 FERC P61,327 (1985),* and that this docket is essentially locked-in. It is not for us to tell Arctic what will serve its purposes. But the points raised by Alaska are well taken. In the absence of Arctic's aggrievement, we do not think it would be prudent for us to continue this proceeding and force continued and protracted litigation on the settling parties.

n55 *738 F.2d 1311 (D.C. Cir. 1984).*

Section 5(1) Relief

Section II-2(f) of the Settlement Agreement has two provisions dealing with the allocation of certain costs among the settling TAPS owners beginning in 1986. In its order of October 23, 1985, the Commission granted the six settling owners' application for approval under section 5(1) of the Interstate Commerce Act n56 of Section II-2(f) [**32] as a pooling agreement for the reallocation of certain costs and revenues. On March 12, 1986, Amerada Hess and Sohio filed a motion in which they ask the Commission to find that "the pooling arrangement under Section II-2(f) of the TAPS Settlement Agreement with respect to Amerada Hess and Sohio is in the interest of better service to the public and economy of operation and will not unduly restrain competition." For the reasons given in the order of October 23, 1985, we so find. n57 Moreover, as requested by Amerada Hess and Sohio, we find that Amerada Hess and Sohio are authorized to participate as parties in the pooling arrangement. n58

n56 *49 U.S.C. § 5*(1) (1976).

n57 *33 FERC at p. 61,140.*

n58 Arctic contends that the pooling agreement has significant anticompetitive effects on Arctic now. We disagree. First, we have found that the pooling agreement will not unduly restrain competition. Second, the pooling agreement provision in question (Section II – 2(f)(ii) of the settlement) will not be operative until 1990 and will not be operational until TAPS is running at less than capacity. Hence, we fail to see how the pooling agreement will have any effect on Arctic until the 1990's, if ever. In any event, as observed by the six original settling owners in their reply, Arctic is not precluded from challenging

the pooling agreement in the future. [**33]

The Commission orders:

(A) The Amendment to TAPS Settlement Agreement filed in these dockets on March 12, 1986, is approved.

(B) Amerada Hess' and Sohio's request for approval under section 5(1) of the Interstate Commerce Act of a pooling agreement for the reallocation of certain costs and revenues is granted.

(C) The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

(D) The ALJs' Initial Decision of April 23, 1986, is affirmed, and Arctic's exceptions thereto are denied.

(E) The settlement and the rates thereunder are not imposed on Arctic which is not bound by the settlement. If and when Arctic is actually aggrieved, it may contest TAPS' rates, including requesting reconsideration of the Commission's approval of the pooling agreement. Our approval of the Amendment to TAPS Settlement Agreement and our approval of the prior TAPS Settlement Agreement in our order of October 23, 1985, does not in any way limit or modify any of the rights of Arctic under the Interstate Commerce Act with regard to the terms, conditions and operation of the settlement. Arctic, as well as any entity which is [**34] not a party to the settlement, may file at any time in the future for an adjudicated rate, which does not exceed the settlement rate.

(F) Docket Nos. OR78-1 and IS84-13-000 (including all subdockets and consolidated dockets) are hereby terminated upon issuance of this order, and to the extent inconsistent with the Settlement Agreement and the Amendment to TAPS Settlement Agreement, all protests in those dockets are denied. The evidentiary record made in this proceeding will be available to Arctic in the future. To the extent that the present record is material and relevant to the issues raised in any future proceeding, Arctic and any other participant in the present proceeding may request incorporation of the present evidentiary record into the record of the future proceeding.

(G) Arctic's motion for oral argument is denied.

ConocoPhillips
Alaska, Inc.

Representative Tom Anderson
Chairman, House Labor and Commerce Committee
Alaska State Capitol, Room 432
Juneau, Alaska 99801

March 26, 2003

Dear Representative Anderson:

As we discussed last week, attached is suggested legislation that ConocoPhillips believes will address the significant problems that have resulted from recent orders issued by the Regulatory Commission of Alaska.

The Regulatory Commission of Alaska (RCA) has overturned a 1986 agreement with the State that ended 7 years of litigation, established TAPS tariff rate certainty for all shippers until 2011, and was approved by the Federal Energy Regulatory Commission as "fair, reasonable and in the public interest."

ConocoPhillips, other TAPS owners and the State have challenged the RCA decision in Superior Court. We are not asking the legislature to overturn that decision.

However, in order to encourage both existing and new companies to invest and have certainty about future pipeline tariffs, create a business environment that supports a fair return on any pipeline owners investment, and provide the confidence that an agreement with the State will be honored by all parties, ConocoPhillips supports the following changes to the Pipeline Act in AS 42.06:

- Clarify that the jurisdiction of the RCA over rates is limited to intrastate tariffs;
- Eliminate the RCA's jurisdiction over State Right-of-Way leases and clarify their authority over dismantlement, removal and restoration;
- Add a new section that ensures RCA support of rate methodologies agreed to in settlement agreements with the State;
- Change the applicable interest rate charged under RCA orders so that it conforms with the interest rate applied in other similar matters.

We look forward to working with you on this issue.

Sincerely,

Jerry Gallagher
Manager, Government Relations

Alaska's Source for Oil and Gas News
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State, feds mum on TAPS tariff issue

Attorney Robin Brena lays out refiner's side of dispute over appropriate transportation rate; says state of Alaska stands to gain $2.5 billion-plus

Ellen Lockyer

PNA Contributing Writer

Federal Energy Commission Chairman Patrick Wood III met with Regulatory Commission of Alaska Chair Nan Thompson in late January during a brief visit to Alaska. Wood afterward spoke to an audience of oil and gas industry leaders.

"She and I (just a few moment's ago) commemorated on paper a memorandum of understanding between our agencies to in fact codify — for the days after I've moved on and the days after she's moved on — that our agencies, regardless of who's running them ... regardless of the fact that they're good friends or not, can in fact continue to have the joint operational relationship over the pipeline industry that Alaska and the federal government are uniquely situated to do."

Wood said it's 'real important' to "make sure that in trying to keep transaction costs, i.e., netback or customer costs down in this industry that we want to make sure that the role of government is appropriate but is as efficient as it can be." He said FERC is committed to working closely with the state of Alaska and the RCA to make sure that in their joint oversight of the oil business as well as other energy producers that 'we work together as friends.'

Given FERC's general goals — promoting a secure, high quality infrastructure for the energy industry; fostering nationwide competitive energy markets and protecting customers and the market through vigilant and fair oversight of transitioning energy markets — Wood's words could apply to any number of issues, although all ears present were waiting to catch the least intimation toward FERC involvement in the on-going dispute between Trans-Alaska Pipeline System owners and two Alaska refiners.

"We'll see ...we'll see where it ends up. I'm just gonna keep real neutral on that one, I'll

just tell ya," Wood told reporters in a good-natured Texas twang after his talk. "We haven't been asked to and so I am not going to opine an opinion. ... We haven't gotten any filings or anything. I've just read the recent decision from the RCA, but I haven't really heard anything subsequent to that about what's going on here on the state level. I know it's in court right now."

Who's blaming who

The dispute hinges on the amount TAPS owners charge for transporting crude oil from Prudhoe Bay to in-state refineries. The matter is before the courts, and a decision could revamp state oil revenues. About 10 percent of North Slope crude is delivered to refineries in Alaska. The rate for intrastate shipment of this oil was set in the mid-eighties in an agreement between the state and the TAPS owners. But times have changed, and Williams Alaska Petroleum Co. and Tesoro Alaska Co. filed a complaint in 1997, alleging TAPS owners were charging them too much.

Anchorage attorney Robin Brena represents Tesoro in regulatory matters. He took the matter to the RCA in the first place.

"Tesoro thought they were paying greater than a just and reasonable rate and so went before the commission and asked the commission to set a just and reasonable rate under the Alaska Pipeline Act," Brena said recently.

Late last year, the RCA agreed that TAPS owners had overcharged in-state refiners from 1997 through 2000, and told the owners to drop tariffs for shipping crude within the state by 57 percent. And the RCA ordered pipeline owners to refund Tesoro and Williams billions of dollars in overcharges. The TAPS owners initially set the rate, under terms negotiated with the state in 1986. Brena says the overcharge is between $1.00 and $1.50 a barrel — accumulating over the years from 1977 through 1996 to a total of $9.9 billion.

State would be loser

And, he says, if the shipping rates are not renegotiated, the state will be the loser. The state loses about one quarter of every dollar of overcharges under the federal rate in oil and severance taxes, Brena insists. He points to the TAPS owners. "We've run numbers to take a look at if they continue to establish rates in the same way in the future as they have in the past they will also overcharge an additional $14.1 billion from 2001 through 2034, the current expected end of the life of the line."

Brena says the state could gain by renegotiating the current agreement with TAPS owners. "To put this in some perspective, the overcharges to date, the roughly $9.9 billion of overcharges, to date the state has forgone $2.5 billion, and if the methodology for establishing rates continues in effect through the expected end of the life of the line today, then the state will have a $3.5 billion interest in the over collections of $14 billion."

He says this ought to be great news for a state that has been wrestling with dwindling income in recent years. Why didn't a hungering Legislature notice the pizza on the doorstep? "Tesoro monitors the rates that it pays and thought that these rates got too far out of line. The methodology that was established front end loaded a lot of the capture of the investment up front, and as time went along the rates should of went down and they did not, and so Tesoro brought the protest."

He says the pipeline owners failed to establish standard rate making practices. "They've overcharged from the get-go," Brena says.

Pipeline owners fighting decision

The oil producers are fighting the RCA decision. BP spokesman Daren Beaudo says the methodology when the original rates were set was agreed on by all parties.

"There's no refund due," Beaudo says, refusing to go into further detail.

ConocoPhillips Alaska President Kevin Meyers calls the RCA decision 'disappointing'. "The industry and the state had an agreement on how we would do TAPS tariffs," Meyers said Jan. 27. "That agreement has been in place since, I think, 1984. ... All parties were equally satisfied or dissatisfied when the deal was put in place. It has several years to run and we believe that's a fair deal for the state, and a fair deal for Alaska. And we have appealed the decision and I believe that, at the end of

the day, we will be found correct."

Decision may take years

Attorney Brena says it may take three years of appeals to state Superior Court before the case in all likelihood reaches the Alaska Supreme Court for a decision. The in-state shippers who have a financial stake in the issue probably won't see any refunds before then. The current agreement between the state and the TAPS owners continues through 2011, but Brena says there is an opportunity in 2006 for the state to initiate renegotiation of the deal. "And it's important to know that that (TAPS Settlement Methodology) methodology establishes a ceiling rate and the TAPS carriers are obligated to charge a rate less than that." He says rate payers are by statute allowed to pay lower tariffs.

The Interstate Commerce Act and the Alaska Pipeline Act to pay what is considered a just and reasonable rate. "And a just and reasonable rate is a rate that allows someone who builds a pipeline the opportunity to recover their investment, to recover their reasonably incurred operating costs, and to make a reasonable return. And so we have asked on the state side for the RCA to set a just and reasonable rate."

Brena: no rate competition

Brena says the intrastate shipping rates have not been adjusted in years, and that they are not in sync with more competitive interstate rates, which are regulated by FERC. It's the federal shipping rate which is used to calculate the state's oil royalty and severance taxes so a re-negotiation could result in more money for the state. There's only one way for oil to leave the North Slope, Brena says, and the lack of competition has broken down the dynamic between shippers and owners.

"There is no rate competition, so the competitive market doesn't set a lower rate. ... Prior to the RCA's decision in 25 years of operation there's never been any rate regulation that's determined a just and reasonable rate. The reason that there has been a failure of rate regulation on the federal side is because the major shippers are also the owners of the pipeline. And what you have is a tremendous financial incentive on the part of an integrated company to make its profit on transportation rather than on production. If it makes its money on transportation, it doesn't owe royalty and severance taxes to the state. If it makes its money on production, it will owe royalty and severance taxes to the state. So in essence, for each dollar that is overcharged on a federal level, the state loses 25 cents in royalty and severance tax." It only works if you pay the dollar from your production company to your transportation company. So there is a tremendous financial incentive for most of the shippers on TAPS to have higher rates so that the state will realize less in royalty and severance taxes, Brena says.

State mum

So far, Alaska Attorney General Gregg Renkes is mum on the subject, although the state is expected to file an appeal within a few days. Just which side of the fray the state will come down on is uncertain.

"The state should be collecting between $100 million and $150 million in additional royalties and severance taxes per year if the rates on the TAPS line on the federal level were set based on standard rate making practices instead of being set at the maximum rate level allowed under their prior settlement agreement." I think the issue gets almost as simple as saying, do Alaskans want to pay a state income tax or do they want the TAPS owners to charge fair rates to their shippers, Brena says.

Lower shipping rates could spur development on the North Slope, he says, because for every dollar the federal rate is reduced the value of the state's oil and gas resources is increased by one dollar per barrel of oil. So if you take the marginal economics of a hundred million barrel field, and you lower the federal rate by a dollar you add a $100 million in value to that field.

And third party producers would be encouraged to invest in the development of marginal fields. The TAPS rate is a barrier to those new producers, and lowering it would be an incentive for them to explore."

HOUSE LABOR & COMMERCE COMMITTEE

STATE CAPITOL, ROOM 432
Phone 465-4954

COMMITTEE MEMBERS

Rep. Tom Anderson
Chairman
Room 432
465-4939

Rep. Bob Lynn
Vice-Chair
Room 415
465-4931

Rep. Nancy Dahlstrom
Room 108
465-3783

Rep. Carl Gatto
Room 411
465-3743

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Room 214
465-4968

Rep. Harry Crawford
Room 426
465-3438

Rep. David Guttenberg
Room 13
465-4457

Labor & Commerce Committee Agenda
Tuesday May 13, 2003

1. HB 277 – Pipeline Utilities Regulation

Alaska State Legislature

Rep. Tom Anderson, Chair
Rep. Bob Lynn, Vice - Chair
Rep. Nancy Dahlstrom, Member
Rep. Carl Gatto, Member
Rep. Norman Rokeberg, Member
Rep. Harry Crawford, Member
Rep. David Guttenberg, Member

House Labor & Commerce Committee

State Capitol
Juneau, Ak 99801-1182
(907) 465-4954
Fax: (907) 465-2418

Date: May 13, 2003

To: Suzi Lowell, Chief Clerk

From: Representative Tom Anderson, Chairman T.A.
House Labor & Commerce Committee

Re: House Labor & Commerce Overview Schedule

The House Labor & Commerce Committee has scheduled to hear the following bills:

Wednesday, May 14th at 3:15 pm. Room 17

+ * HB 227 – District Courts and Small Claims

Bills Previously Heard/Scheduled

Friday, May 16th at 3:15 pm. Room 17

Bills Previously Heard/Scheduled

+ - Teleconferenced
* - First Hearing in First Committee of Referral
= - Bill was Previously Heard/Scheduled

HB

282

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 23, 2004 **FURTHER REFERRALS:**

Date of Committee Action: February 2, 2004

The LABOR AND COMMERCE Committee considered: **HB 282**

HOUSE BILL NO. 282 **UNIVERSITY EMPLOYEE RESEARCH CONTRACTS**

"An Act relating to contracts between the University of Alaska and its employees involving research or other development of intellectual property and to the authority of the president of the University of Alaska regarding employee contracts for development of intellectual property."

Recommends it be replaced with [ ] HCS *or* [ ] CS *for* _____(_____)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero
ADM	1			X
UA	2			X

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	CRAWFORD	X			
	LYNN			X	
	GATTO			X	
	DAHLSTROM			X	
	ROKEBERG	X			
	GUTTENBERG	X			
Chair: Tom Anderson	ANDERSON	X			
Chair:					