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Order 151 at 12, *quoting Re Kenai Pipeline Co.*, 12 APUC 425, 433 (Alaska P.U.C. 1992). A careful review of Order 151 will show that the intrastate rates are set correctly, are fully compensatory, and should not be nullified by a FERC order under Section 13(4).

In their Petition (at 15 n.35), the Carriers mistakenly rely on *King*, 344 U.S. 254, *supra*, to suggest that the disparity in rates establishes that the RCA-set intrastate rates do not recover a fair share of costs. The *King* decision fails to support the Carriers in the instant case. Although it addressed Section 13(4), the Court in *King* addressed the issue of whether the ICC could consider deficiencies in railroad passenger revenues as compared to freight revenues when setting rates. *Id.* at 276. Relying on particularized ICC findings that significant deficiencies in interstate rail-passenger revenues burdened interstate freight revenues, the Court affirmed the ICC's finding that the same relationship to these two services (freight and passenger) also applied to intrastate service. *Id.* at 267. That issue – the economic relationship between two different types of services – is not the issue presented here.

Of even greater importance, the specific ICC findings relied upon in *King* included a finding that rail-carriers were experiencing significant revenue deficiencies resulting from declining interstate passenger service. *Id.* at 274. These findings were the result of investigative reports developed by the ICC in cooperation with and endorsed by state commissioners. *Id.* at 257-58 and 274. In contrast, there has been no finding by either FERC or the RCA that the Carriers have experienced significant revenue deficiencies. To the direct contrary, the RCA concluded that TSM rates allowed the Carriers the opportunity to *over-recover* costs by $9.9 billion (Order 151 at

8), and the Carriers have offered no evidence of significant revenue deficiencies or declining profitability other than to compare the intrastate and TSM-set interstate rates and conclude that there is a $38 million difference – evidence that is not the result of a FERC investigation, is not supported by the RCA, and does not rise to the level endorsed by any state commissioner or relied upon by the ICC or the Court in *King*.

(2) COMPARISONS OF RCA INTRASTATE RATES TO VAN HOECKE OPINION 154-B BENCHMARK RATES ARE NEITHER PERSUASIVE NOR RELEVANT.

The Carriers incorrectly compare their witness Van Hoecke's Opinion 154-B benchmark analysis to the RCA-set intrastate rates in the hope of demonstrating undue discrimination. (Kalt, Exh. ATC-4 at 62:11-12.) This Opinion 154-B analysis results in a rate even higher than their filed TSM-based interstate rates. (Kalt, Exh. ATC-4 at 62:11-14.) This comparison fails, among other reasons, because the Carriers' Opinion 154-B analysis uses the wrong depreciation accrual and depreciation reserve that fail to take account of the TSM accelerated depreciation that has actually been collected in interstate rates and reported by the Carriers for 20 years. The comparison is also defective because it includes other unjustified non-cost components like the APB charge and a SRB adjustment, which grossly inflate costs and property balances in the rate base. (Overcast, Exh. A/T-159 at 13:4-14:14.) The deficiencies of the Carriers' Opinion 154 analysis are described in detail in Exhibits including A/T- 3, 52, 78 and 140.

The Carriers unsuccessfully employed the same strategy in the RCA proceeding – attempting to use a benchmark with incorrect inputs to justify a lower but still unjust and unreasonable TSM-based rate:

> It seems intuitive that if one adds additional costs to the revenue requirement in the federal jurisdiction by inflating

> rate base, recovering depreciation expense [that was] previously recovered and adding back to rate base dollars previously amortized, the resulting costs for intrastate service from the federal cost study must exceed state rates. *The under recovery arises from a flawed cost analysis, not inadequate state rates.*

(Overcast, Exh. A/T-159 at 14:7-12, emphasis added.) In this regard, one of the Carriers' own witnesses acknowledged during cross examination that the Opinion 154-B rate was so high and difficult to collect that his company would "choke" if it filed such a rate. (Barnaby, Tr. 2567:3-23.)

Although benchmarking is never an acceptable substitute for cost-of-service ratemaking, the Carriers' reliance on benchmark rates (an Opinion 154-B rate and a SAC rate) is misplaced. Benchmarking can cut both ways and here cuts against the Carriers. In this Section 13(4) proceeding the Carriers have the burden to demonstrate that their proposed intrastate rates are just and reasonable.[31] Anadarko and Tesoro also have offered an Opinion 154-B analysis based on *correct* cost inputs as opposed to the Carriers' *incorrect* inputs that have already been rejected by the RCA. Since the Carriers' benchmark rates exceed both the TSM-based rates and the Anadarko/Tesoro's Opinion 154-B rate, according to the Carriers' own theory FERC could as easily conclude that the Anadarko/Tesoro Opinion 154-B rates are the correct just and reasonable rates and should be used as the proper comparison with Order 151 rates. If the Anadarko/Tesoro Opinion 154-B rates are used as the benchmark, then the Carriers' TSM rates are not just and reasonable.

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[31] *See* Joint Stipulation of Issues (corrected October 13, 2006) at 2 (Carriers' acknowledge they bear the burden to demonstrate rates are just and reasonable).

As noted in Order 151, the D.C. Circuit rejected the use of benchmarks as a methodology for establishing just and reasonable rates:

> The D.C. Circuit Court of Appeals explained to the FERC quite clearly that approving rates that fall below a cap is not an acceptable way to set just and reasonable rates. The D.C. Court stated that setting a ceiling in that case only served as a cap on egregious price exploitation by regulated pipelines; it did not properly set just and reasonable rates.

Order 151 at 34, *citing Farmers Union Cent. Exch., Inc. v. FERC,* 734 F.2d 1486, 1502 (D.C. Cir. 198).

The Carriers offered no cost-of-service study to establish under-recovery or inadequate returns, and no evidence at all demonstrating flaws in Order 151 or the Alaska Superior Court's decision affirming Order 151. They have failed to prove, let alone with a "high standard of certainty," that that the intrastate rates are abnormally low and that they do not contribute a fair share to the Carriers' costs. Thus they failed to prove the first critical element of their Section 13(4) claim that their evidence proves that intrastate rates are "abnormally low." They rely solely on comparisons between the RCA-set rates and the Carriers' TSM rates and then their Opinion 154-B benchmark – comparisons that courts and the RCA have discounted. In contrast, using generally the same cost-based legal principles upon which FERC relies, Order 151 clearly establishes intrastate rates that are just, reasonable and fully compensatory of the Carriers' actual costs of providing intrastate service. FERC should not substitute the non-cost-based TSM rates for those cost-based Order 151 rates.

2. THE CARRIERS FAILED TO SHOW THAT CONDITIONS AS TO THE MOVEMENT OF INTRASTATE TRAFFIC WERE NOT MORE FAVORABLE THAN THOSE EXISTING IN INTERSTATE COMMERCE.[32]

The RCA did not proffer evidence on this issue. As discussed in Section V.D.6(D) below, the Supreme Court has recognized that states have the right to adopt ratemaking methodologies that are different from those used by the federal agency even where conditions of service are similar. The Carriers fail to show why FERC should use Section 13(4) to deprive the RCA of a right to a cost-based methodology consistent with Alaska law.

3. THE CARRIERS FAILED TO PROVE THAT INTRASTATE RATES CAST AN UNDUE BURDEN ON INTERSTATE COMMERCE OR ON INTERSTATE SHIPPERS.

With regard to the third key element of their case, the Carriers failed to show that the intrastate rates have resulted in any discrimination against, or obstruction to, interstate commerce or interstate shippers. They have not demonstrated that non-carrier affiliated Alaska refineries (1) materially compete outside Alaska; (2) have increased their use of ANS crude as a result of the RCA-set intrastate rates; or (3) through their use of ANS crude have caused West Coast refineries to invest billions of dollars for upgrades to process alternative crudes. The Carriers' assertions that interstate commerce has been harmed by the RCA's intrastate rates are based on mere generalizations with no evidentiary support. (Overcast, Exh. A/T- 93 at 35:10-18.) This failure of proof is fatal to the Carriers' case.

As a threshold matter, the Carriers' failure to proffer cost-of-service evidence is fatal to their claim that intrastate rates discriminate against interstate commerce or

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[32] This is the second element of a Section 13(4) case identified in *Utah*.

shippers. To conclude that a cost-based rate is discriminatory, FERC must initially examine the cost-of-service used to derive the rates at issue.[33] In *Alabama Electric Co-op., Inc.*, 684 F.2d 20, 27 (D.C. Cir. 1982), the court in addressing a claim of rate discrimination held:

> [I]t has come to be well established that electrical rates should be based on costs of providing service to the utility's customers, plus a just and fair return on equity. FERC itself has stated that "[i]t has been this commission's long standing policy that rates must be cost supported...."

Id. at 27, quoting Carolina Power & Light Co., Docket No. ER76-495, By Direction Letter (Oct. 2, 1979). The court explained that even where the discrimination claim was based on two customer groups receiving substantially similar service, the gravamen is whether "the costs of providing service to one group are different from the costs of serving the other...." *Id.*

Since the Carriers have offered no probative cost-of-service evidence related to providing intrastate service, the Carriers have failed to make the required foundation for their claim that intrastate rates discriminate against interstate commerce or interstate shippers. Stated another way, an intrastate rate that fully recovers the actual costs of intrastate service cannot discriminate against interstate commerce.

(A) THE CARRIERS FAILED TO SHOW THAT INTRASTATE SHIPPERS MATERIALLY COMPETE IN AND COULD MATERIALLY AFFECT INTERSTATE COMMERCE.

Carrier witness Kalt's unsupported theory (Exh. ATC-4 at 64-65) that Alaska refineries compete with West Coast refineries because they "export[] some refined

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[33] *See The Potomac Edison Co.*, 56 FPC 3179 (1976) (explaining that not all rate distinctions are prohibited, but only those "as between customers of the same class, and then only undue discrimination – that which is not justified by differences in cost of service, operating conditions or other such considerations").

gasoline..." fails to prove that Alaska refineries compete with West Coast refineries or have any effect on relevant United States markets. The non-Carrier affiliated refineries located in Alaska that use TAPS-delivered ANS crude are in a different market from refiners located outside Alaska (*e.g.*, West Coast and Hawaii). In contrast to the markets served by West Coast refineries, the vast majority of petroleum products refined by the non-Carrier affiliated refineries are consumed within Alaska. (Sanderson, Exh. FHR-2 at 4-6.)[34]

Competition by refineries not affiliated with the Carriers against other suppliers of refined products in the non-Alaskan markets is *de minimis* when compared to the aggregate volumes of refined products sold on the West Coast. (*Id.*) Flint Hills' witness Sanderson established that, of the three refinery owners in Alaska, the Tesoro refinery is the primary exporter of finished light products and that Tesoro's exports are limited to less than 30% of Tesoro's total shipments. (Sanderson, Exh. FHR-2 at 9:10-20.) These shipments represent no more than 0.2% of total West Coast refining capacity and 0.2% of total finished light products on the West Coast. (Sanderson, Exh. FHR-2 at 10:1-6.)

According to Anadarko/Tesoro witness Dr. Overcast, the Tesoro refinery in Alaska accounts for only "2.3 percent of the total refinery capacity on the West Coast." (Overcast, Exh. A/T-93 at 38:11-18). Dr. Overcast concludes from Tesoro's market share that, hypothetically, if the intrastate rates did cause any impact on availability of ANS crude to West Coast refiners, the impact would be limited to less than 2%. (*Id.* at

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[34] The Presiding Judge sustained an objection to questions by Carriers on cross examination intended to show that the consumption of refined products (*e.g.*, jet fuel) within Alaska, whether produced locally or imported, was at all relevant to demonstrate impact on interstate markets. (Tr. 6219:20-6220:17.)

38:15-18). And, since the West Coast and Alaskan refineries make up only 18.5% of United States refining capacity, the effect of reduced ANS supply would be less than 0.4% nation-wide. (*Id.* at 38:15-18.) Even if Tesoro's Alaska refinery were able to quadruple its usage of ANS crude capacity and assuming the same increase in finished light product exports, its shipments would still be less 1% of the West Coast market – a negligible effect on competition.

(B) THE CARRIERS FAIL TO SHOW THAT THE RCA'S INTRASTATE RATES HAVE CAUSED INCREASED USE BY ALASKA REFINERIES OF ANS CRUDE.

The bare theoretical allegations by the Carriers' witness Kalt (Exh. ATC-4 at 65-66; Exh. ATC-161 at 38) that Alaska refineries' use of ANS oil has increased as a result of the lower intrastate rates is contradicted by substantial record evidence.[35] As discussed herein, the record shows that the slight increase in Tesoro's consumption of ANS crude is primarily the result of a decrease in the supply from its preferred source of local crude (Cook Inlet) and an increase in demand within Alaska.

Total Alaska crude refining capacity between 2001 and 2006 has varied less than 4% and actually declined slightly between 2004 and 2006, the period during which the RCA finalized TAPS intrastate rates for years 2001, 2002, and 2003. (Exh. FHR-2 at 6-8; Exh. FHR-4.) While it is true that Tesoro's Kenai refinery has experienced an increase in ANS crude usage, that increase was not *caused* by lower intrastate rates. Flint Hills witness Sanderson explains that while the majority of Alaskan refineries

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[35] The Carriers' allegation even appears inconsistent with the Carriers' own filed testimony. The Carriers' witness Dr. Kalt noted (Exh. ATC-161 at 40:11-14) that Flint Hills has actually "reduced the quantity of ANS crude oil it refines in Alaska by 10,000 barrels a day...."

depend solely on TAPS to deliver the crude that they process, the Kenai refinery processes both ANS and other (*e.g.*, local) crudes. (Sanderson, Exh. FHR-2 at 5-7.)

The Kenai refinery's preferred source of crude, which comes from Cook Inlet, is a local crude that is not delivered by TAPS. The Kenai refinery uses ANS crude only to the extent it cannot receive delivery of enough Cook Inlet crude to satisfy the demand for its products. (Exh. FHR-2 at 14:3-14.) Cook Inlet crude supplies have been decreasing, which has required the Kenai refinery to use more ANS crude to satisfy the same product demand. (Exh. FHR-2 at 14:11-14; Exh. FHR-9, Tesoro Kenai Refinery Crude Oil Throughput by Type.)

Anadarko/Tesoro witness Dr. Overcast confirms the causal relationship between decreasing Cook Inlet supply and Tesoro's resultant increased reliance on ANS crude. (Overcast, Exh. A/T-159 at 14:17-15:10; Tr. 6221-23.) Dr. Overcast notes that there was a modest increase in intrastate shipments to Kenai in 2006 of 1.6 million barrels and that the "decline in Cook Inlet production explains most of this increase in intrastate deliveries." (Overcast, Exh. A/T-159 at 14:17-15:1.) Dr. Kalt acknowledges Kenai's increased usage of ANS crude but offers no evidence that would rebut the interdependent relationship between Cook Inlet and ANS crude. (Exh. ATC-161 at 38.)

As Cook Inlet supplies continue to decrease and the demand in Alaska for Kenai's refined products continues to increase, the Kenai refinery will have to purchase more ANS crude to meet that demand irrespective of the magnitude of the intrastate price. The Carriers have not disputed this fact and offer no substantial evidence to support their theoretical relationship between intrastate prices and small local increases in ANS crude usage.

(c) THE CARRIERS FAIL TO SHOW THAT THE RCA'S INTRASTATE RATES CAUSED MAJOR WEST COAST REFINERY INVESTMENTS.

The Carriers' claim (Kalt, Exh. ATC-4 at 66:19-67:5) that lower intrastate rates have somehow caused West Coast refiners to invest billions of dollars to upgrade their refineries is completely unfounded. First, accepting the Carriers' dubious claim for argument's sake, upgrading investment is not typically viewed as an economically negative act. Second, the claim is not merely dubious, it is specious. The Carriers' sole support for this contention is an *Oil and Gas Journal* article dated 1997, published more than five years *before* Order 151 was issued. (Kalt, Exh. ATC-4 at 67, n.65.) Mr. Sanderson explains not only that the article preceded the RCA's implementation of lower intrastate rates but that the investment the article discussed was to facilitate processing of "the growing supplies of California crude anticipated at that time and to comply with [ ] California's very stringent formulated gasoline regulations...." (Sanderson, Exh. FHR-2 at 15:3-16.)

Anadarko/Tesoro's witness Dr. Overcast identifies a number of factors that could have led to capital investment in West Coast refineries including "refining of more California crude oil, the political opposition to tankers as a supply source (a further limitation on ANS imports and incentive to refine ANS locally), and to produce the reformulated gasoline required in California." (Overcast, Exh. A/T-93 at 36.) Recognizing that ANS crude supply had been on the decline since 1988, Dr. Overcast finds it reasonable that West Coast refineries would make capital investments to facilitate the refining of oil sourced from locations other than ANS if they hoped to maintain the same product output. (*Id.* at 37.) In fact, Dr. Overcast notes (*Id.* at 37:8-12) that West Coast and Alaskan refineries since 1990 "consistently operate at capacity

factors in excess of 87 percent annually," which confirms that alternative crude supplies (and capital investment to process that crude) were and remain necessary to maintain high capacity factors in light of decreasing ANS supplies. The Carriers have not proved that refinery infrastructure investments on the West Coast were in any way the result of Order 151.

(D) THE CARRIERS AND THEIR PARENT COMPANIES DOMINATE THE INTERSTATE ANS CRUDE MARKET; INDEPENDENT ALASKA REFINERIES HAVE A NEGLIGIBLE EFFECT ON THAT MARKET.

The Carriers' assertion that reductions in ANS deliveries to the West Coast are caused by the lower intrastate rate is unsupported. (Kalt, Exh. ATC-4 at 63). The Carriers' affiliates export 98% of all ANS crude oil that leaves Valdez (Sanderson, Exh. FHR-2 at 11:21-23) from which it can be reasonably concluded that no one else can compete to supply ANS crude to the West Coast.[36] As Dr. Overcast explains, the decline in ANS deliveries began long before Order 151 was issued: "As illustrated in Exhibit A/T-94, the production of Alaska North Slope ('ANS') crude began to decline in 1988 and declined continuously through 2001, except for 1991. After a slight increase in 2002 production, production has continued to fall off through 2005." (Overcast, Exh. A/T-93 at 35).

Order 151 (issued in November 2002) cannot be responsible for a decline in ANS output that began in 1988. Dr. Overcast correctly concluded (Exh. A/T-93 at 35) that no party has offered any analysis to show any causal link between lower intrastate rates

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[36] Of the approximately 900,000 barrels per day ("bpd") produced at Pump Station 1, approximately 800,000 bpd are delivered by TAPS to the Valdez terminal. Only 20,000 to 30,000 of those 800,000 bpd is processed by Tesoro's Alaskan refinery; the rest is exported. (Sanderson, Tr. 3098-104.)

and declining ANS output. The Carriers failed to provide any substantial evidence to prove that lower RCA intrastate rates have harmed interstate commerce.

(E) THE CARRIERS FAILED TO DEMONSTRATE ANY INJURY TO INTERSTATE SHIPPERS HAS RESULTED AND WILL CONTINUE TO RESULT BECAUSE OF THE DISPARITY IN RATES.

The Carriers incorrectly allege that interstate shippers will be injured as a result of the RCA's intrastate rates because the Carriers are permitted under the Interstate Settlement Agreement to pass onto interstate shippers whatever costs the RCA disallows. (Kalt, Exh. ATC-4 at 62:16-63:5.) The Carriers argue that the lower RCA intrastate rates result in an annual "$38 million shortfall in intrastate rates" when compared to the TSM intrastate rate that they filed and the RCA rejected. (Kalt, Exh. ATC-4 at 64:3-5; Kalt, Exh. ATC-161 at 44:1-3; *see* Toof calculation, Exh. ATC-12 at 61:11-14.) Dr. Toof calculates a $49 million shortfall for 2006 (Toof, Exh. ATC-164 at 50:13-16). Through the application of the Interstate Settlement Agreement crediting mechanism, the Carriers note that this "shortfall" is being paid "dollar for dollar, by interstate shippers (*unless a TAPS Carrier decides for some reason to take a voluntary revenue reduction*)." (Kalt, Exh. ATC-4 at 64:9-15, emphasis added.)

The Carriers' allegation fails to prove harm to interstate shippers from the lower intrastate rates for two key reasons. First, the alleged harm is directly caused by the Carriers' voluntary application of the Interstate Settlement Agreement crediting mechanism, not the intrastate rates. The costs the Carriers pass through (or shift) to interstate shippers are costs associated with intrastate service that the RCA disallowed in Order 151 as not just and reasonable. The RCA recognized that while the Interstate Settlement Agreement permits this result, it does not mandate it:

> [A]lthough the Carriers may apply revenue "shortfalls" from intrastate to interstate tariffs, nothing in the Interstate Settlement Agreement requires them to do so. If the Carriers take advantage of the Settlement's crediting provision, future interstate tariffs for the same transportation service will rise above the cost-based intrastate rates that we determine in this order to be just and reasonable. *Although the Carriers certainly have an incentive to raise rates, they also have an incentive to treat the State and ... shippers fairly.*

(Order 151 at 30-31.)

Second, the Carriers are the only parties complaining about potential injury to interstate shippers. *No independent interstate shipper filed any testimony in support of the Carriers' position.* Because 98% of the ANS crude that leaves the Valdez terminal in interstate commerce is shipped by Carrier-affiliated shippers (Sanderson, Exh. FHR-2 at 11:21-23), the shippers that are allegedly injured by the Carriers' voluntary decision to shift disallowed intrastate service costs to interstate shippers are the Carriers' own affiliates or, more appropriately, the Carriers' parent companies where the revenues ultimately reside.

State's witness Dr. Rapp effectively counters the Carriers' argument that interstate shippers are subsidizing intrastate shippers. (Exh. SOA-6 at 24-27.) Dr. Rapp correctly notes that no Carrier witness has demonstrated that RCA intrastate rates are below cost and that, absent such a showing, there can be no economic subsidy. (Exh. SOA-6 at 24-25.) As Dr. Rapp notes, Dr. Toof's calculation does not attempt to compare intrastate rates with the actual cost of intrastate service. "All he does is demonstrate that, under his application of the TSM for setting maximum interstate rates, an increase in revenues from intrastate service leads to lower maximum rates for interstate service." (Exh. SOA-6 at 26:9-12.) Even if reduced RCA rates automatically

resulted in increased interstate rates – which is not the case – there is no subsidy because there is no evidence that the cost of intrastate service is not fully recovered in intrastate rates, as discussed above.

The alleged injury to interstate shippers flows from the Carriers' decision to use the Interstate Settlement Agreement to recover from interstate shippers putative revenue shortfalls due to Order 151. Whether the Carriers decide to continue to recover these unjust and unreasonable revenues from interstate shippers (primarily their own affiliates) is their choice (until FERC decides that their ability to do so is unjust and unreasonable). However, the Carriers' exercise of this choice is not an injury caused by Order 151 rates.

4. THE CARRIERS FAILED TO PROVE THAT A SUBSTANTIAL INCREASE IN THEIR REVENUE WILL RESULT FROM THE PROPOSED INCREASE IN THE INTRASTATE RATES.

Since the Carriers have not submitted cost-of-service evidence, they have not proved that the currently effective intrastate rates fail to fully recover the cost of intrastate service. If we assume *arguendo* that the intrastate rates do not fully recover costs, the Carriers fail to show the amount of the increase that would be needed to increase the intrastate rates to a cost-justified level. Therefore, there is no practicable way to determine whether such an increase would satisfy the Supreme Court's test of substantiality.

We emphasize that we are merely assuming for argument's sake that the intrastate rates do not fully recover costs, when in fact those rates do fully recover costs as the RCA found in Order 151. We also emphasize that if (hypothetically) intrastate rates did not fully recover costs and if other evidentiary requirements were satisfied, any

Section 13(4) increase would not be to the TSM rate level but to the cost-justified level. The reason is that Supreme Court precedent, as discussed above, would not allow the FERC to increase the intrastate rates to recover more than actual intrastate costs. The fact that there might be a disparity between the intrastate rates and the interstate TSM rates is irrelevant. Reliance on the disparity in rates in and of itself is insufficient to sustain a Section 13(4) claim. *Mississippi,* 124 F. Supp. at 816. If the disparity is not cost-based both at the intrastate and interstate levels and if there is not additional evidence addressing other elements of a Section 13(4) claim, there is no FERC authority to supersede a state ratemaking decision and modify a state-set rate.

There is an additional possibility. FERC may elect to depart from the TSM rates and establish a just and reasonable interstate rate that eliminates unjustified non-cost components like APB, employs accelerated TSM depreciation for the period pre-2005, incorporates the correct useful life for post-2005 straight-line depreciation, and makes other appropriate corrections to the Carriers' Opinion 154-B analysis. In that event, any difference between the RCA-approved intrastate rates and FERC-approved interstate rates will be considerably smaller and could be non-existent, and the issue of the alleged need for substantially increased revenues will become moot.[37]

5. THE CARRIERS FAILED TO DEMONSTRATE THAT THEIR PROPOSED INTRASTATE RATES ARE JUST AND REASONABLE.

The cases in which the Supreme Court affirmed an ICC order under Section 13(4) were all cases in which the ICC, pursuant to Section 15a, had established overall

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[37] *See* Section V.D.1(A) above.

just and reasonable revenue requirements for railroad carriers.[38] The ICC then determined that abnormally low intrastate rates prevented the railroad carriers from achieving minimum total just and reasonable revenue requirements. Here there is no foundation for the fifth key element of the Carriers' Section 13(4) case because the TSM revenue requirements that the Carriers seek to impose on intrastate shippers have never been determined by FERC to be just and reasonable.

The Carriers failed in the RCA proceeding to demonstrate that TSM resulted in just and reasonable rates, principally because TSM is not a standard original cost-based methodology and provides an opportunity for significant over-recovery of their investment. (Order 151 at 8.) The RCA, relying on a traditional DOC analysis, developed a just and reasonable rate that provided for a fair share of the Carriers' costs. In the unlikely event FERC decides that the Carriers' TSM rates are just and reasonable for interstate purposes, the Presiding Judge would have to conclude with a high standard of certainty based on substantial evidence that every other Section 13(4) condition was satisfied and, in particular, that the intrastate rates were not contributing their fair share of total revenue requirements, before FERC could supplant the RCA intrastate rate.

As discussed below, there is no requirement in the ICA that either rates or ratemaking methodologies be identical at the federal and state levels.[39] The intrastate rates are designed to be and in fact are entirely compensatory for the Carriers. There

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[38] In any event, establishing revenue requirements pursuant to Section 15a – as was done in the Section 13(4) cases – makes no sense because TAPS is not a railroad. *See* Section V.A above.

[39] *See* discussion *infra* Section V.D.6(D).

may be reasonable differences between the rates adopted by the RCA and by FERC. Such reasonable differences are well within the federalism contemplated by the ICA and the U.S. Constitution and may account for differences in the resulting rates but would not provide a rationale for nullifying intrastate rates pursuant to Section 13(4).

6. ADDITIONAL FACTORS SUPPORT REJECTION OF THE CARRIERS' SECTION 13(4) PETITION.

The court in *Mississippi,* in applying the Supreme Court's decision in *North Carolina,* recognized that the federal agency must take into consideration conditions and circumstances in addition to the five key elements identified by the court, in deciding whether the agency may supplant the intrastate rate. 124 F. Supp. at 814-15.[40] The relevant additional factors in this case strongly support rejection of the Carriers' Petition.

(A) PUBLIC POLICY CONSIDERATIONS

The ICA provides FERC broad authority to establish interstate rates, as it will do in this proceeding. As discussed above, Section 13(4) of the ICA does not authorize FERC to prescribe intrastate oil pipeline rates. However, if the Presiding Judge concludes that FERC does have such jurisdiction, FERC's authority to nullify intrastate rates is very narrowly constrained. FERC's nullification of an intrastate rate, established after full due process pursuant to state law, raises serious policy concerns.

Consistent with Constitutional principles of federalism, the ICA assigns the primary authority for establishing intrastate rates to the states. Here, the RCA spent

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[40] *See also Utah*, 356 U.S. at 425, noting that the five key findings were "*inter alia*" adequate to support a Section 13(4) order; in *King*, 344 U.S. at 266, the court held that Section 13(4) must be construed "in light of § 15a(2) and as supplementing it"; *Florida II*, 292 U.S. at 7 n.3, discussing House Report regarding the need for the ICC to consider various factors "in the public interest."

several years establishing the intrastate rates at issue, as reflected by the 75,000 pages of the record in those proceedings. The intrastate rates were established by Order 151, which was affirmed by the Superior Court of Alaska and is now on appeal to the Alaska Supreme Court.

The possible preemption of these rates by this Commission is a matter of serious concern to the RCA and no doubt to other state commissions. For this reason, the Chairman of the RCA and two RCA Commissioners were present at the commencement of this proceeding, and the RCA has monitored this proceeding closely. If this Commission does exercise its authority under Section 13(4), all of the legal proceedings in Alaska will be essentially overruled, and the time and energy spent on those proceedings will have been wasted.

A decision to preempt the Alaska intrastate rates would also have the deleterious effect of rewarding the Carriers' transparent forum-shopping tactics: having failed to win the high intrastate rates they sought at the RCA for the pre-2001 period, the Carriers then turned to this Commission to set both interstate rates and, as a matter of first impression and without any involvement by the RCA, intrastate rates. Of course, the Presiding Judge need not even reach the Carriers' forum-shopping strategy since (1) Section 13(4) does not provide FERC with authority to prescribe intrastate oil pipeline rates; and (2) the Carriers' failure to satisfy Section 13(4)'s stringent burden of proof requirements, in and of itself, is dispositive against and requires rejection of their Petition.

Any decision by the FERC to nullify the RCA's rates will have serious repercussions beyond Alaska to the rest of the country. States will be decidedly less

secure in establishing intrastate rates for oil pipelines, and oil pipelines will be emboldened to seek further nullification of such rates under Section 13(4), essentially vetoing less-than-favorable state commission decisions.

Because of the basic principles of federalism at stake, the Supreme Court has recognized these policy considerations in establishing the stringent burden of proof on Section 13(4) petitioners. The Court recognizes that "intrastate transportation is primarily the concern of the State," *Utah*, 356 U.S. at 425-26; that Section 13(4) authority is "exceptional," *Chicago, Milwaukee*, 355 U.S. at 306; and that the justification for the exercise of this exceptional power "must clearly appear," *Florida I*, 282 U.S. at 211-212. Also (and as discussed below), Congress attempted to avoid these negative effects through Section 13(3), which contemplates coordination and consultation and even joint hearings as a means of preserving and respecting the state regulatory process. Consistent with controlling precedent, the Presiding Judge should take into account these public policy factors that weigh heavily against granting the Section 13(4) Petition.

The fact is that neither the ICC nor FERC has ever issued an order raising intrastate oil pipeline rates. As the Argument demonstrates, this is emphatically not the case that should break with precedent.

(B) THE CARRIERS' FAILURE TO MAKE FILINGS TO RAISE INTRASTATE RATES SHOULD PRECLUDE THEM FROM ARGUING BEFORE FERC THAT INTRASTATE RATES ARE ABNORMALLY LOW AND NON-COMPENSATORY.

The Presiding Judge should determine that the regulatory history of Order 151 and the Carriers' own conduct precludes them from claiming at FERC that intrastate rates are abnormally low and non-compensatory. As discussed in this subsection, the

Presiding Judge can rely on one or more well-settled principles of deference, waiver, and judicial comity to find that Carriers are barred from relitigating the reasonableness of the intrastate rates. If she finds that the Carriers are thus precluded, their Section 13(4) challenge necessarily fails.

Intrastate rates that are the result of extensive and comprehensive state commission proceedings deserve reasonable deference by the federal agency. *Mississippi*, 124 F. Supp. at 814. In setting aside the underlying ICC order, the District Court in *Mississippi* recognized that the duty to fix intrastate rates is primarily the state's duty and in that case emphasized that the state commission "gave great study and investigation and heard much testimony before the [state] Commission itself and not through an examiner." *Id.* The court also noted: "The findings of a state commission which is familiar with such conditions in the state, ... when its opinion differs from the Interstate Commerce Commission's findings detracts heavily against the findings of the Interstate Commerce Commission...." *Mississippi*, 124 F. Supp. at 815.

The identical regulatory circumstances pertain here. As in *Mississippi*, Order 151 is the result of extensive state administrative proceedings. (*See, e.g.*, Order 151 at Endnote 2; Exh. A/T-138.) The Order 151 proceeding before the RCA required a period of six years at a cost of approximately $20 million. (Brown, Exh. A/T-78 at 69:18-70:3.) The record supporting Order 151 spans 75,000 pages, including numerous depositions and exhibits. (*Id.*)

In its 168-page order (excluding endnotes and exhibits), the RCA found the TSM-set rates to be unjust and unreasonable and determined rates, based on a traditional DOC analysis, that are just and reasonable. (Brown, Exh. A/T-78 at 70:10-15.) The

RCA's guiding regulatory principle in the Order 151 proceeding was that the Carriers should be permitted to recover their actual costs of operations, the return of their capital, and a reasonable return on their investment. (*See, e.g.*, Order 151 at 12.) Order 151 was affirmed by the Alaska Superior Court in all respects. (January 18, 2006 "Decision and Order" in Case No. 3AN-02-13511 CI; Brown, Exh. A/T-78 at 73:21-24.) The Carriers appealed the Superior Court decision to the Alaska Supreme Court; oral arguments are scheduled for March 2007. As in *Mississippi*, FERC should recognize and afford reasonable deference to the extensive investigation and proceedings that led to the RCA's issuance of Order 151.

In Order 151, the RCA offered the Carriers the opportunity to file cost-based rates consistent with the principles set forth in Order 151 to the extent the Carriers sought higher intrastate rates after 2000. (Order 151 at 162.) The Carriers have continuously refused to file cost-based intrastate rates as required by Order 151 and instead have filed TSM rates at the RCA for the years 2001-2007.[41] Because the Carriers have refused an ongoing opportunity to make filings to raise intrastate rates, the Carriers have continued to collect the rates established in Order 151. The RCA orders rejecting the Carriers' TSM filings for 2001 through 2006 are part of the evidentiary record in the instant FERC proceeding.[42]

For purposes of this Section 13(4) proceeding, the Carriers' continuing failure to file *at the RCA* for increased intrastate rates constitutes a waiver of their right to now

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41 *See, e.g.*, RCA Orders in Docket Nos. P-03-4(34); P-04-4(1); P-05-1(1); P-06-1(1); P-07-1(1) (orders rejecting TSM rates).

42 *See* Appendix B for a list of relevant RCA orders.

complain *at FERC* that intrastate rates are abnormally low and non-compensatory. Waiver is the "intentional relinquishment or abandonment of a known right." *Kontrick v. Ryan,* 540 U.S. 443, 458 n.13 (2004). If the Carriers were able to show that cost-based intrastate rates should be higher than Order 151 rates, they would have filed such rates at the RCA, but they have chosen not to do so. The Carriers have clearly waived their right to apply for higher intrastate rates at the RCA.

The Presiding Judge should also consider whether the ratemaking decisions reached by the RCA on the merits and affirmed by the Alaska Superior Court are in the interest of equity and fairness entitled to a degree of judicial comity. Judicial comity is "[t]he respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other's laws and judicial decisions." BLACK'S LAW DICTIONARY 262 (7th ed., 1999).[43] Order 151 found that the intrastate rate is not abnormally low and does adequately compensate the Carriers for all components of their cost of service.

Based on one or more of the well-established principles discussed above, the Presiding Judge should determine that the extensive proceedings before the RCA and/or the Carriers' waiver of their rights to file new tariffs compliant with Order 151 prohibit the Carriers from challenging the Order 151 rates before FERC as abnormally low and non-compensatory.

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[43] The Commission has concluded that it is not proper to reconsider an issue previously decided by a civil court. *United Gas Pipe Line Co.*, 20 FERC ¶ 63,070 at 65,293-94 (1982), *aff'd*, 31 FERC ¶ 61,336 (1985), *aff'd in pertinent part*, 824 F.2d 417 (5th Cir. 1987).

(c) THE CARRIERS' TRANSPARENT END-RUN AROUND ALASKA REGULATORY PROCESS SHOULD NOT BE PERMITTED.

Rather than comply with Alaska law, the Carriers attempt an end-run around the regulatory and judicial process in Alaska by petitioning FERC to set aside the intrastate rates. (Brown, Exh. A/T-78 at 74:13-75:12.) Their Section 13(4) Petition is nothing more than transparent forum-shopping. The Carriers have not, since Order 151 was issued, filed at the RCA in compliance with Alaska law to establish a test year for future rates, which undermines their complaint that the intrastate rates are not compensatory. In Order 151 the RCA "[concluded after] careful review of the record ... that the 1997-2000 filed intrastate TAPS rates do not satisfy the AS 42.06 requirement that pipeline rates be just and reasonable, set new 1997-2000 rates *and order[ed] filings so that we can set rates for 2001 and subsequent years.*" (Order 151 at 1-2, emphasis added.)

In Ordering Paragraph 13 (Order 151 at 167) the RCA clarified that the information the Carriers were required to file (by January 13, 2003) was the information necessary to calculate a revenue requirement and rate base for 2001 and future years using the DOC methodology. Instead of complying with that filing requirement, the Carriers continued to limit their filings at the RCA to the higher TSM-based intrastate rates. (Brown, Exh. A/T-78 at 74:18-75:22.) On December 16, 2005, the RCA rejected the Carriers' TSM intrastate filings for 2006 "because the filings do not contain the supporting information required by our regulations." (Exh. A/T-136.) A similar order was issued on December 28, 2006 rejecting Carriers' TSM intrastate filings for 2007. (*See* P-07-1(1), *Order Rejecting 2007 Intrastate TAPS Settlement Methodology Rates.*)

The Carriers appealed Order 151 to the Alaska Superior Court and lost. The Court upheld the RCA's order in all respects. The Superior Court reached the following conclusions on issues now raised in this proceeding before FERC:

(1) "that RCA has a reasonable basis to conclude that the rates from 1977 through 1982, filed by the Carriers but never approved on their merits by the Alaska Public Utilities Commission, *were sufficiently robust to be deemed inclusive of accelerated depreciation*," *Amerada Hess v. RCA*, 3AN-02-13511C1 at 32 (Jan. 2006) (emphasis added);

(2) "that the initial rate base and *the 1983-1985 rates were retroactively established under TSM* in accord with the accelerated precept," *id.* (emphasis added);

(3) "that the *1982 depreciation stipulation was superseded by the TAPS settlement and had no effect* on the initial rate base and subsequent rates," *id.* (emphasis added);

(4) "that *accelerated depreciation* was embedded in all post-settlement rates, and *was properly used to derive the year-end 1996 rate base* [which was the test year for the 1997 intrastate rate]," *id.* (emphasis added);

(5) "that *artificial reversion to a deemed straight-line depreciation ab initio would unreasonably subject the shippers to the burden of twice compensating the Carriers* for a portion of their investment and contravene RCA's mandate to set just and reasonable rates," *id.* at 32-33 (emphasis added);

(6) that the settlement does not preclude non-parties or the RCA from looking at the "TAPS settlement to measure accumulated depreciation for purposes of rate base calculation," *id.* at 34; and

(7) that the "RCA twice afforded the carriers an opportunity to file rates supported by actual cost data [but] [t]he Carriers persisted in their more theoretical rate defense," *id.* at 47.

Having lost at the RCA and on appeal at the Alaska Superior Court, the Carriers attempt a hedging strategy both by appealing the Superior Court decision to the Alaska Supreme Court to set aside Order 151 and, in parallel, petitioning FERC under Section

13(4) to supplant the RCA-set intrastate rate. Oral arguments before the Alaska Supreme Court are scheduled for March 2007, two months before the Presiding Judge's Initial Decision is due in this proceeding.

The Presiding Judge should not reward the Carriers' forum-shopping. Instead, she should allow due process to take its full course in Alaska by permitting the Alaska Supreme Court to have the last word on Order 151.

(D) IN THE ABSENCE OF UNDUE DISCRIMINATION, SOME DIFFERENCE BETWEEN INTRASTATE AND INTERSTATE RATES IS REASONABLE.

Once FERC sets a just and reasonable interstate rate that complies with Opinion 154-B based on appropriate cost inputs, the RCA anticipates that the magnitude of difference between interstate and intrastate rates will decrease markedly but may not disappear entirely. It is significant that the ICA does not require state and federal rates to be identical:

> It is suggested that the [ICC], in granting general interstate increases, frequently proceeds on the assumption that intrastate rates will be raised to the same level. But this assumption is no through ticket permitting it to approach the question of intrastate rates with partiality for a uniform increase. *Rate uniformity is not necessarily the goal of federal regulation, nor can the [ICC]'s wishful thinking be substituted for substantial evidence.* Section 13 is not cast in terms of "assumption" or "partiality." As applied to this case, it contemplates an inquiry into intrastate rates and conditions within [the state]....

Utah, 356 U.S. at 428 (emphasis added). This is a point upon which both the RCA and the Carriers agree. (Kalt, Exh. ATC-161 at 43:15-17.)

State witness Dr. Rapp agreed that there is more than one way to determine a just and reasonable rate and that a difference in rates resulting from the RCA's use of DOC and FERC's use of 154-B TOC does not imply that the RCA rate is non-

compensatory. (Tr. 3956 – 3961.) Differences in the capital structure, return on equity, debt cost, and depreciation method used by FERC and the RCA could all reasonably explain rate differences without implying that the state rate is non-compensatory. (*Id.*) Furthermore, to the extent rate differences merely represent timing differences in the revenue recovery over the life of the TAPS asset, the rate disparity may be nominal rather than actual for Section 13(4) purposes and thus not a proper basis for a Section 13(4) claim.

In Order 151 (at 150) the RCA found that

> the appropriate life of TAPS for ratemaking purposes extends through the year 2026, fifteen years beyond the current assumed 2011 end of TAPS life. Accordingly, for ratemaking purposes we find that the remaining economic life of TAPS as of January 1, 1997 extends for 30 years to December 31, 2026.

Because the RCA found that TAPS has a longer operational life than the period stipulated in the Intrastate Settlement Agreement, intrastate depreciation charges are lower on a yearly basis than TSM depreciation rates.

Also, the intrastate rates established by the RCA do not include charges for DR&R:

> Because many years remain in the life of TAPS during which we can adjust the amounts to be collected for DR&R, because DR&R issues are complex and costly, and because we do not have a sufficient record to rule on appropriate DR&R charges for 1997-2000, we do not award DR&R in this order.

(Order 151 at 157-58.) The Carriers were provided an opportunity to prove that DR&R charges should be recovered in current rates, but they waived their right to do so.[44] The Carriers neither address this key difference between intrastate rates and TSM rates, nor do the Carriers show why they are entitled to recover DR&R charges in intrastate rates on the basis of a cost-based ratemaking methodology. (Sullivan, Exh. A/T-79, at 24-27.)

(E) COLLATERAL ESTOPPEL APPLIES TO THE CARRIERS' CLAIM THAT INTRASTATE RATES ARE NON-COMPENSATORY.

Under collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry,* 449 U.S. 90, 94 (1980). The United States Supreme Court concluded that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *Univ. of Tennessee v. Elliott,* 478 U.S. 788, 797-98 (1986), *quoting United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 at 421-22 (1966). The Court found that "giving preclusive effect to administrative fact-finding serves the value underlying general principles of collateral estoppel: enforcing repose." *Univ. of Tennessee*, 478 U.S. at 798.

FERC routinely recognizes the applicability of the doctrine of collateral estoppel to its administrative judicial proceedings where changed circumstances do not justify

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[44] *See Amerada Hess Pipeline Corp.*, P-03-4 (Order No. 34) at 75-76, n.190 (2004). Citing *Statement and Proposed Guarantees of the TAPS Carriers*, filed June 15, 2003, the RCA notes that "Carriers have waived any right to seek additional DR&R funds in intrastate rates for 2001, 2002 and 2003."

relitigation. In *Nantahala Power & Light Co.*, 29 FERC ¶ 61,179 at 61,374 (1984), FERC noted that "the doctrines of *res judicata* and collateral estoppel are applicable to administrative proceedings." (*Id.*, *citing Utah Constr. & Mining Co.*, 384 U.S. at 442.) FERC concluded that collateral estoppel (or issue preclusion) may be invoked "with its usual purpose of preventing relitigation of issues earlier aired by the parties and determined by an adjudicatory tribunal." (*Id.* at 61,374, n.4, *citing Second Tax. Dist. of Norwalk v. FERC*, 683 F.2d 477, 484 (D.C. Cir. 1982).)

FERC has explained that collateral estoppel applies as a matter of policy "only where the issues were fully litigated and decided on the merits, and no new evidence or new circumstances would justify relitigation." *Iroquois Gas Transmission Sys., L.P.*, 87 FERC ¶ 61,268 at 62,092 (1999), *citing, e.g., San Diego Gas & Elec. Co. v. Pub. Serv. Co. of New Mexico*, 86 FERC ¶ 61,253 (1999); *see also Nevada Power Co.*, 27 FERC ¶ 61,487 at 61,940 (1984) (granting motion for summary judgment because company "suggested no changed circumstances to justify a departure from the consistent precedent"); *Cent. Kansas Power Co., Inc.*, 5 FERC ¶ 61,291 at 61,621 (1978) ("It is contrary to sound administrative practice and a waste of resources to relitigate issues in succeeding cases once those issues have been fully determined."); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000) (reversing and remanding FERC's application of collateral estoppel for failing "to respond meaningfully to the [new] evidence").

The essential elements of collateral estoppel are present here, in particular with respect to whether the intrastate rates set by the RCA are just and reasonable, and therefore by necessity not abnormally low and non-compensatory. The Alaska Superior

Court affirmed in all respects the RCA's decision in Order 151 that rejected TSM-based rates and set just and reasonable rates. To reach this decision, the RCA had to determine that those rates provide sufficient compensation consistent with the United States Supreme Court decision in *Hope*,[45] the D.C. Circuit decision in *Farmers Union*,[46] Alaska Stat. § 42.06.370 and Alaska state commission decisions,[47] all of which require that intrastate rates be just and reasonable. The Carriers in the RCA proceeding that lost on the issue of whether the intrastate rates are sufficiently compensatory are the same parties before FERC in this proceeding. To make their Section 13(4) case, Carriers must prove the converse of what has been decided by the RCA and affirmed by the Superior Court, *i.e.*, they must prove that the intrastate rates are not sufficiently compensatory.

Nor have the Carriers offered any evidence of changed circumstances that would justify relitigation of the just and reasonableness of the intrastate rates set in Order 151. Order 151 established intrastate rates that were originally limited to years 1997 through 2000. Rather than comply with Order 151 and state statutes, the Carriers have chosen year after year not to justify higher rates under cost-based ratemaking principles as required in Order 151 and Alaska statutes.[48] As a consequence, the Order 151 rates continue to apply and Carriers have not offered any changed circumstances, either at the RCA or in this proceeding, which would warrant relitigation.

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45 *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

46 *Farmers Union*, 734 F.2d at 1502.

47 *See, e.g., Re Kenai Pipeline Co.*, 12 APUC 425, 433, 1992 WL 696192 (Alaska P.U.C. 1992).

48 *See* Appendix B listing RCA Orders rejecting Carrier intrastate rate filings.

Principles of collateral estoppel or issue preclusion encompass decisions by state courts or state regulatory agencies that satisfy the traditional criteria discussed above. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 n.6 (1982), the Court noted that "the federal courts consistently have applied res judicata and collateral estoppel to causes of action and issues decided by state courts." The court in *Dias v. Elique,* 436 F.3d 1125, 1128 (9th Cir. 2006), held that "[f]ederal courts give the same preclusive effect to the decisions of state administrative agencies as the state itself would...." There is no factual, legal or policy reason why FERC should not give preclusive effect to the RCA's findings, as affirmed by the Superior Court, that intrastate rates are fully compensatory.

The Presiding Judge should apply the doctrine of collateral estoppel to prevent the same parties (the Carriers) from relitigating the same issue (that the intrastate rates are sufficiently compensatory) that has been conclusively decided by the RCA and affirmed by the Alaska Superior Court. If the Presiding Judge does not determine that the Carriers' right to challenge the intrastate rates as non-compensatory before FERC is barred, consistent with *Mississippi*, she should nevertheless give substantial weight to the RCA's extensive proceedings and the fact that the Carriers have refused for six years to file cost-based rates in Alaska. Under the first required element of the Section 13(4) *prima facie* case, the Carriers' refusal to file cost-based rates in Alaska constitutes substantial evidence that intrastate rates are fully compensatory if cost-based ratemaking principles are applied.[49]

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[49] *Mississippi*, 124 F. Supp. at 814; *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

(F) SECTION 13(3) OF THE ICA AUTHORIZES FERC TO HOLD JOINT HEARINGS WITH THE RCA.

Section 13(3) of the ICA[50] provides that the state affected by the Section 13(4) Petition shall be "notified of the proceeding" and further provides:

> The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission.

In Section 13(3) Congress recognized the extraordinary effect of nullifying state regulatory orders; expressed respect for principles of federalism; and provided authorization for cooperative regulation between the federal commission and the affected state regulatory commission.

Although the Carriers' Petition refers to Section 13(3) in passing, it specifically requested that the Commission consolidate their Petition with the ongoing proceedings in Docket Nos. IS05-82-000 *et al.* The Carriers' motion for consolidation was an integral part of their "end-run" strategy discussed above to evade the regulatory processes in Alaska. In its August 5, 2005 Notice of Intervention in Docket No. OR05-10-000, the RCA stated at page 2:

> The Regulatory Commission of Alaska files this notice of intervention under 18 C.F.R. § 385.214(a)(2), to participate as a party to preserve its ability to inform the Federal Energy

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50 Interstate Commerce Act, 49 U.S.C. § 13(3) (1976), reprinted in 49 U.S.C. app. § 13(3) (1988). Section 13(3) is set forth in full in Appendix A.

> Regulatory Commission of its position on the petition and related motion in the event the Federal Energy Regulatory Commission does not exercise its discretion under Section 13(3) of the Interstate Commerce Act, 49 U.S.C. App. § 13(3) (1995), to confer and hold a joint hearing with the Regulatory Commission of Alaska on this matter.

Although Congress stopped short of mandating joint regulatory proceedings in Section 13(3), that statute expresses a strong endorsement of such joint proceedings, and the RCA expressed its own receptivity to such joint hearings in its Notice of Intervention. In view of the Congressional intent in Section 13(3), the Presiding Judge should give substantial weight to the fact that the Carriers sought to avoid joint state and federal hearings in their motion to consolidate their Petition with other FERC proceedings and to the fact that a FERC order issued in the absence of such joint hearings may be deficient in the circumstances of this case because the Section 13(4) proceeding did not (at the request of the Carriers) avail itself of the significant state regulatory participation that Congress authorized.

E. CONCLUSION

The Carriers brought the RCA into this consolidated FERC proceeding by filing their July 20, 2005 Section 13(4) Petition to nullify the intrastate rates the RCA meticulously established after a complex and extensive administrative proceeding. A careful examination of the history, the statutory language, and the Supreme Court cases construing Section 13(4) shows that Congress restricted the scope of Section 13(4) to railroads. However, if the Presiding Judge does find that FERC has jurisdiction, the Carriers have entirely failed to meet their exacting burden of proof under Section 13(4), and the Presiding Judge should therefore reject the Petition as unsupported on this record.

In Section V of this Initial Brief, the RCA shows why the Presiding Judge should reject the Carriers' Section 13(4) Petition. As threshold matters, the Presiding Judge may find (1) that the Carriers' Section 13(4) case lacks foundation if she rejects TSM rates and establishes cost-based rates without a material difference from the cost-based rates established by Order 151; and (2) that the Carriers should be precluded from arguing that intrastate rates are abnormally low because they failed to present cost-based evidence showing that intrastate rates do not permit them to recover their actual cost of service.

On the merits of the Section 13(4) case, the Carriers failed to prove a single one of the five critical elements of that case, let alone all five elements. The most significant failures of proof were (1) the failure to show that intrastate rates are abnormally low and non-compensatory; (2) the failure to show any substantial harm to interstate commerce or interstate shippers; and (3) the failure to show that TSM rates are just and reasonable.

The Presiding Judge should consider additional non-economic factors that support rejecting the Section 13(4) Petition. First, public policy considerations, considered in light of the relevant Supreme Court opinions, strongly support permitting Order 151 rates to remain in place until changed under Alaska law. Second, the Carriers should be barred from challenging intrastate rates as too low because they have refused for years to file cost-based tariffs that would allow them to charge higher intrastate rates. Third, the Presiding Judge should not reward the Carriers' transparent forum-shopping strategy; instead due process demands that the Alaska Supreme Court have the final word on intrastate rates. Fourth, the ICA does not require intrastate rates

and interstate rates to be uniform, and the RCA and the FERC have discretion within their respective jurisdiction to apply different ratemaking approaches. Fifth, the Carriers' claim that intrastate rates are non-compensatory is subject to the well-established doctrine of issue preclusion. Sixth, in light of Section 13(3), any Section 13(4) order issued in the absence of joint federal and state regulatory proceedings may be deficient.

For these reasons, the Presiding Judge should reject the Section 13(4) Petition in this proceeding.

Respectfully submitted,

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APPENDIX A

RELEVANT STATUTES

SECTION 13(3) OF THE ICA

(3) Investigation involving State regulations; conference of State and interstate commissions

Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this Appendix.

SECTION 13(4) OF THE ICA

(4) Duty of Commission where State regulations result in discrimination

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any

carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SECTION 15a(2) OF THE ICA AS ENACTED IN 1920

In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* that the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

SECTION 15a(2) OF THE ICA AS AMENDED IN 1933

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed ; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

APPENDIX B

CHRONOLOGY OF DOCKET NOS. P-97-4 & -7 AND SUBSEQUENT DOCKETS

11/27/02 RCA issues Order 151 rejecting Carriers' 1997 through 2000 TSM-based intrastate rates and setting just and reasonable rates for years 1997 through 2000. Order P-97-4(151)/P-97-7(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*, dated November 27, 2002 (Exhibit A/T-31)

12/26/02 RCA issues order suspending and setting for investigation Carriers' 2003 TSM-based intrastate rates, establishing temporary rates and directing Carriers to file rates based on a depreciable cost-of-service analysis as required by Order 151. This order also consolidates in a single docket the suspension and review of Carriers' previously filed TSM-rates for years 2001 and 2002. Order P-94-1-1(118)/P-97-4(152)/P-97-7(111)/P-03-4(1). *Order Suspending TAPS Intrastate Tariff Rates Filed to be Effective January 1, 2003; Opening Docket P-03-4 to Investigate Rates; Designating Public Advocacy Section as a Party; Appointing Administrative Law Judge; Establishing Temporary and Refundable Rates Equal to Filed Rates; Allowing Rates of Phillips Transportation Alaska, Inc., to go into Effect on a Temporary and Refundable Basis with Less Than Thirty Days Notice; Approving Tariff Sheets; Transferring Consideration of TAPS Rates for the Period January 1, 2001 Through December 31, 2002 to Docket P-03-4; and Changing Docket Titles*, dated December 26, 2002.

2/11/03 RCA issues order directing parties to file briefs that would address whether the RCA should set new temporary intrastate rates equal to the intrastate rates set in Order 151 for year 2000. Order P-03-4(5). *Order Affirming Electronic Notification Requiring Briefing on New Temporary Rates, Rescheduling Prehearing Conference and Establishing Hearing*, dated February 11, 2003.

4/18/03 RCA issues order establishing temporary intrastate rates for 2003 equal to the rates set in Order 151 for year 2000 and affirming opportunity for Carriers to participate in a hearing to determine if the new temporary rates cover current operating and maintenance expenses and debt obligations. Order P-03-4(10). *Order Proposing Revised Temporary 2003 TAPS Intrastate Rates, Affirming Opportunity for Hearing and Scheduling Briefing*, dated April 18, 2003.

12/19/03 RCA issues order rejecting Carriers' 2004 TSM-set rates because Carriers failed to supply cost-of-service support required in Order 151. Order P-04-4(1). *Order Rejecting 2004 Intrastate TAPS Settlement Methodology Rates*, dated December 19, 2003. (Exh. A/T-134)

6/10/04	RCA issues order rejecting Carriers' 2001 through 2003 TSM-set rates as non-conforming and unsupported, and setting permanent intrastate rates for years 2001 through 2003 equal to the Order 151 rates for year 2000. Order P-03-4(34). *Order Rejecting the TAPS Carriers' 2001-2003 TSM Intrastate Filings, Rejecting the TAPS Carriers' Post-2000 Revenue Requirement and Rate Filings, Establishing Permanent Post-2000 Intrastate TAPS Rates, Requiring Refunds, Ordering Release of Escrowed Funds, Letters of Credit, and Bonds; Approving Filings and Affirming Electronic Rulings*, dated June 10, 2004. (Exh. A/T-50)
12/30/04	RCA issues order rejecting Carriers' 2005 TSM-set rates because Carriers failed to supply cost-of-service support required in Order 151. Order P-05-1(1*). Order Rejecting 2005 Intrastate TAPS Settlement Methodology Rates*, dated December 30, 2004. (Exh. A/T-135)
12/16/05	RCA issues order rejecting Carriers' 2006 TSM-set rates because Carriers failed to supply cost-of-service support required in Order 151. Order P-06-1(1). *Order Rejecting 2006 Intrastate TAPS Settlement Methodology Rates*, dated December 16, 2005. (Exh. A/T-136)
12/28/06	RCA issues order rejecting Carriers' 2007 TSM-set rates because Carriers failed to supply cost-of-service support required in Order 151. Order P-07-1 (1). *Order Rejecting 2007 Intrastate TAPS Settlement Methodology Rates*, dated December 28, 2006.

APPENDIX C

GLOSSARY

APPENDIX C

GLOSSARY

ADIT	Accumulated Deferred Income Tax
AFUDC	Allowance for Funds Used During Construction
ANS	Alaska North Slope
APB	Allowance Per Barrel
APUC	Alaska Public Utilities Commission, predecessor to Regulatory Commission of Alaska (RCA)
AS	Alaska Statutes
Carriers or TAPS Carriers	Oil pipeline companies that directly own an interest in the Trans-Alaska Pipeline System and are a party in this proceeding
Chicago, Milwaukee	*Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Illinois*, 355 U.S. 300 (1958)
DOC	Depreciated Original Cost rate-making methodology
DOE	Department of Energy
DR&R	Dismantlement, Removal and Restoration
FERC	Federal Energy Regulatory Commission
Florida I	*Florida v. United States*, 282 U.S. 194 (1931)
Florida II	*Florida v. United States*, 292 U.S. 1 (1934)
ICA	Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* (1976), reprinted in 49 U.S.C. app. § 1 *et seq.* (1988)
ICC	Interstate Commerce Commission
Interstate Settlement Agreement	1985 Interstate Settlement Agreement between Carriers and State of Alaska (Exh. A/T-33)
Intrastate Settlement Agreement	1986 Intrastate Settlement Agreement between Carriers and State of Alaska (Exh. A/T-34)

IRR	Internal Rate of Return (*see* Order 151 at 24)
King	*King v. United States*, 344 U.S. 254 (1952)
Louisiana	*United States v. Louisiana*, 290 U.S. 70 (1933)
Mississippi	*Mississippi Pub. Serv. Comm'n v. United States*, 349 U.S. 908 (1955)
North Carolina	*North Carolina v. United States*, 325 U.S. 507 (1945)
Opinion 154-B	*Williams Pipe Line Co.*, 31 FERC ¶ 61,377 (1985)
Order 151	Order Rejecting 1997, 1998, 1999 and 2000 Filed TAPS Rates; Setting Just and Reasonable Rates, Requiring Refunds and Filings; and Outlining Phase II Issues, RCA Order P-97-4(151)/P-97-7(110), dated November 27, 2002
Petition	Carriers' Section 13(4) petition filed July 20, 2005
RCA	Regulatory Commission of Alaska
SAC	Carriers' Stand-Alone Cost benchmark
Section 13(4)	Section 13(4) of the Interstate Commerce Act, 49 U.S.C. app. § 13(4)
SRB	Starting Rate Base (*see* Opinion 154-B)
TAPS	Trans-Alaska Pipeline System
TOC	Trended Original Cost rate-making methodology (see Opinion 154-B methodology)
TSM	TAPS Settlement Methodology contained in the Interstate Settlement Agreement and the Intrastate Settlement Agreement
Utah	*Pub. Serv. Comm'n of Utah v. United States*, 356 U.S. 421 (1958)

CERTIFICATE OF SERVICE

I hereby certify that I have served this day copies of the foregoing on the official service list compiled by the Office of the Secretary in accordance with Rule 2010 of the Commission Rules of Practice and Procedure.

Dated at Washington, D.C. this 16th day of February, 2007.

/s/
William D. Booth

Bruder, Gentile & Marcoux, L.L.P.
1701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20006-5807
Telephone: 202/296-1500
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E-Mail: wdbooth@brudergentile.com

Counsel for
Regulatory Commission of Alaska

M:\WDOX\CLIENTS\205rca\BLF6161.DOC

2/16 Initial Briefing

John Katz - FERC ATTY

~~Kate FERC~~ 3/21

1

5 commissioners

1985 - TAPS

1

May 18th — Admi. Judge Ruling

130 days

2002

1

20 days

State & FERC Comm. staff - in agreement -

Kate Gard - GIERD

For RCA FERC Council - Carmen Gentille

~~1985 TAPS~~

1

~~2002~~

1 Office - Protection of sover. x/ St. or A for setting rates for oil trans. Preserving authority of SOA that set rates - trans

TAPS Carriers - brought case - Appeal W/ Ruling

Tool tracing - Only Sec 12.4 Interstate Comm. Act.

Chiefly applied to Railroad traffic. ICC right to determination

Carmen Centille -
Intra State shippers - unfair adv.
over Interstate shippers.

Discrimination, unfair adv.
State rates so low -

ICC 13-4 - never applied to o/trans.

Hypo. evidence -
→ No Actual cost of service were submitted -
No way to determine.

no contention w/interstate rate
→ have contention w/intraState rates w/regard
Acc depreciation taken.

Steven Broze - Stepdoe & Johnson, law firm in D.C.
Interstate - 1985
set a ceiling
emphasize - status of what it stands today
early stages - case - final decision is far
from over. Premature to elaborate.
→ We will be responding quite vigorously with
FERC staff's briefing on 3/21
Comm. approved settlement 1985 -

DISCRIMINATION CLAIM –

Phil Reeves - AK Dept of law - Asst AG
Oil, Gas & Mining -
DoL Managers in the case
- in the midst of briefing -

2005 & 2006 Rates - States right
Enforce a specific part of the agreement -
Again, under I.C. Act. 13.4., sect. 203 -
Intra Rates lowered to Inter -
1.9% (4.00 – carriers charges - Protest 2005
Daf – [illegible]

→ seeking to correct unjust

RCAO 151 – still @ Supreme Court
[illegible]
Tariffs – wellhead value of the oil –
unjust discrimination –
FERC Staff Report – looked at cost – only typ – will
[illegible] they have to show actual

Mark Hanley – ANADARKO –

Kip, Attorney –

11/27/02 – Press Release –
INTRA 1.96 INTER +5.00 (2007)
22% @ Alpine

filed a case in 2004 on the Interstate rate.
Happy to have FERC's stuff come out in support of our case – don't know what Comm. + Admin. ginned

KIP KNUDSEN – Co. TESORO AK, EXTERNAL AFFAIRS MGR.

Brought CI

(1) methodology –
(2) TSM meth. does not tease out just + reasonable rate

Robin Brenna – Presentation

just + Reasonable rate 2.00 – 5.00
INTRA – INTER

amount over 2.00 – excess rate, each yr. they operate TAPS.

→

TSM – Ratio –
Billions overcollected. RCA + FERC staff observed
Bird not elect to defend rate – offered a proxy case – acc. depr.

FERC's policies not suited for AK - multiple lines

Neg. TSM 2 - all ind. meter w/ State.

& FAIR Deal - recoverable costs - once, not twice.

Term ELEMENT - Determine whether it's a cost based.

Producer owned pipelines? Lower 48 - Generally main line is regulated - lots of segment lines. AK is different - Only 1 line.

Independent Producers - 1st thing to look at Open access to existing fac. w/in fields

Jones Act - only a few.

---

① Gail Anderson - Dept. of Rev., Tax Director
Joyce -
John Rusk -
① - State revenue effects / FERC rates - (not tied to State's litigation.
2005 —— 2008 Rem. 1/01/09 - State may renegotiate State's share (~ 25% $818 million as refund rate Tailor our assumptions to anything the key wants.

John Iverson
Ran those #'s

Joyce – Refer to online
Used 10% ↓ lower than last forecast
Volume ↓

forecast of oil $ ↑ than in the fall.

model 2005 – [2007 – 2008 speculate] forecast on
TSM model – historical #s. Diff between
~~In~~ Tract Rate

State's share @ 25% in 2010 with interest

PPT – in the middle of analysis

Gutterman; pg. 24 #6 –

Gatto? ~~Disposed~~ DP&R – none in calculation. Did the proceeds collected & the current balance. Initial settlement – Finite amount

John Rush – TSM allowed for I.S.B. over the life of the ~~—~~ + interest

Thernandt

model –

Did not anticipate DR&R is overcollected

Didn't factor that in –

★★ Outline of the Dept. of Revenues model they just ran –

└ & They can provide that

Potentially significant to the States' Treasury.

3/7/07 CONFIRMA-TION: LARRY HARTIG, CMMISSNR, DEC

CONFIRMATION COMMITTEE REPORT

Action date: MARCH 7, 2007

The Resources Committee has reviewed the qualifications of the following Governor's appointee and recommends that this name be forwarded to a joint session for consideration:

Commissioner - Department of Environmental Conservation
Mr. Larry Hartig

This does not reflect intent by any of the members to vote for or against this individual during any further sessions for the purposes of confirmation.

Signature:	Printed Last Name
	WILSON
	SEATON
	EDGMON
	GATTO
	GOTTLIEBSON
Chair:	Johnson
Chair:	GATTO

Please return to the Chief Clerk's office.

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION
OFFICE OF THE COMMISSIONER

SARAH PALIN, GOVERNOR
410 Willoughby Ave., Ste 303
Post Office Box 111800
Juneau, AK 99811-1800
PHONE: (907) 465-5066
FAX: (907) 465-5070
http://www.dec.state.ak.us

Larry Hartig

Commissioner Hartig is an attorney with more than 20 years experience in environmental law, regulations, permits and land use issues. Prior to his appointment in 2007 by Alaska Governor Sarah Palin as Commissioner of the Department of Environmental Conservation, he was in private practice as an attorney with the Anchorage law firm of Hartig Rhodes Hoge & Lekisch, PC. Joining the firm in 1983, Commissioner Hartig worked primarily on environmental, natural resources, and commercial matters. His practice included assisting clients in obtaining environmental and other permits for natural resource development projects, as well as projects involving environmental compliance and cleanup of contaminated properties. Clients included government, private developers, industry and Native Corporations, among others. He also worked as a landman in the Land/Legal Department of Alyeska Pipeline Service Company between 1972 and 1976.

Commissioner Hartig has a B.A. from the University of Utah and received his J.D. from Lewis and Clark College. He is a member of the Alaska Bar Association, and a former member of the State Board of Forestry.

LAWRENCE L. HARTIG

PRACTICE AREAS

- Environmental Law
- Natural Resources
- Commercial
- Transactions
- Real Property

ADMITTED TO PRACTICE IN

- Alaska (1983)

EDUCATION

- University of Utah (B.A., 1975)
- Lewis and Clark College (J.D., 1983)

PROFESSIONAL AND COMMUNITY ORGANIZATIONS

- Member, State Board of Forestry (1994-Present)
- Member, Alaska Bar Association
  (Co-Chair of Natural Resources and Environmental Section)
- Member, Alaska Mining Association
- Director, Resource Development Council (2004 – Present)
- Board Member, Alaska Mineral and Energy Education Fund (AMEREF) (1985-Present)

WORK EXPERIENCE

Mr. Hartig has been in private practice in Anchorage since 1983, working primarily on environmental, natural resource, and real estate law matters. He holds an "AV" rating, the highest legal ability and ethical standards rating given to attorneys by the Martindale-Hubbell Law Directory.

His environmental law practice includes assisting clients in obtaining air, water and other permits for natural resource development and other projects, providing legal guidance relating to environmental compliance and cleanup of contamination, and representing clients in administrative proceedings, litigation and appeals involving claims brought under state and federal environmental statutes.

His natural resource practice includes the acquisition of exploration and mineral rights for mining and oil and gas companies, the negotiation and preparation of joint venture agreements, assignments, purchase agreements, royalty provisions and other transactional agreements, and the preparation of title opinions, unit applications and joint operating agreements.

His real estate and commercial practice includes the negotiation and drafting of contracts, leases, easements, loan agreements and other loan documents, negotiating loan work outs and title issues. Such work has also included drafting environmental provisions in sale, loan and lease agreements, obtaining permits and authorizations from regulating agencies for construction on wetlands and tidelands and for the discharge of fill and other materials, providing legal guidance relating to the investigation and cleanup of contamination, and representing clients in litigation brought under state and federal environmental statutes.

Clients include resource development companies, banks, title companies, private developers, retirement trusts, FDIC, fish processors, timber companies, trusts, municipalities, the State of Alaska and Native Corporations.

Mr. Hartig was the Chief Title Officer and Regional Underwriter for SAFECO Title Insurance Co. of Oregon, Portland, Oregon from 1981-1982. He was responsible for overseeing underwriting, auditing and training practices of Safeco's twenty-two branches and agencies in Oregon.

From 1979-1981, he was employed by the Multnomah County (Portland) branch of SAFECO, as its title officer in charge of major commercial transactions.

Mr. Hartig was the manager of Peninsula Title Insurance Agency, Inc., in 1978-1979, overseeing the title and escrow operations in its Kenai and Homer offices.

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Alaska State Legislature

House of Representatives

Office of the Chief Clerk

State Capitol, Room 216
Juneau, AK 99801-1182
Phone: (907) 465-3725
Fax: (907) 465-5334

Official Business

MEMORANDUM

Date: February 9, 2007

To: Representative Gatto, Co-chair
Representative Johnson, Co-chair ✓
Resources Committee

From: Suzi Lowell
Chief Clerk

Subject: Governor's Appointments

The Speaker referred the following Governor's appointment to the Resources Committee:

Commissioner - Department of Environmental Conservation
Mr. Larry Hartig

The Speaker referred the following Governor's appointment to the Resources Committee and the House Special Committee on Fisheries:

Commissioner - Department of Fish and Game
Mr. Denby Lloyd

Committee reports and resumes are attached for your use.

Attachments as noted

LAWRENCE L. HARTIG

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- Real Property

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RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original documents after microfilm reproductions have been made.

Stan Hubbard

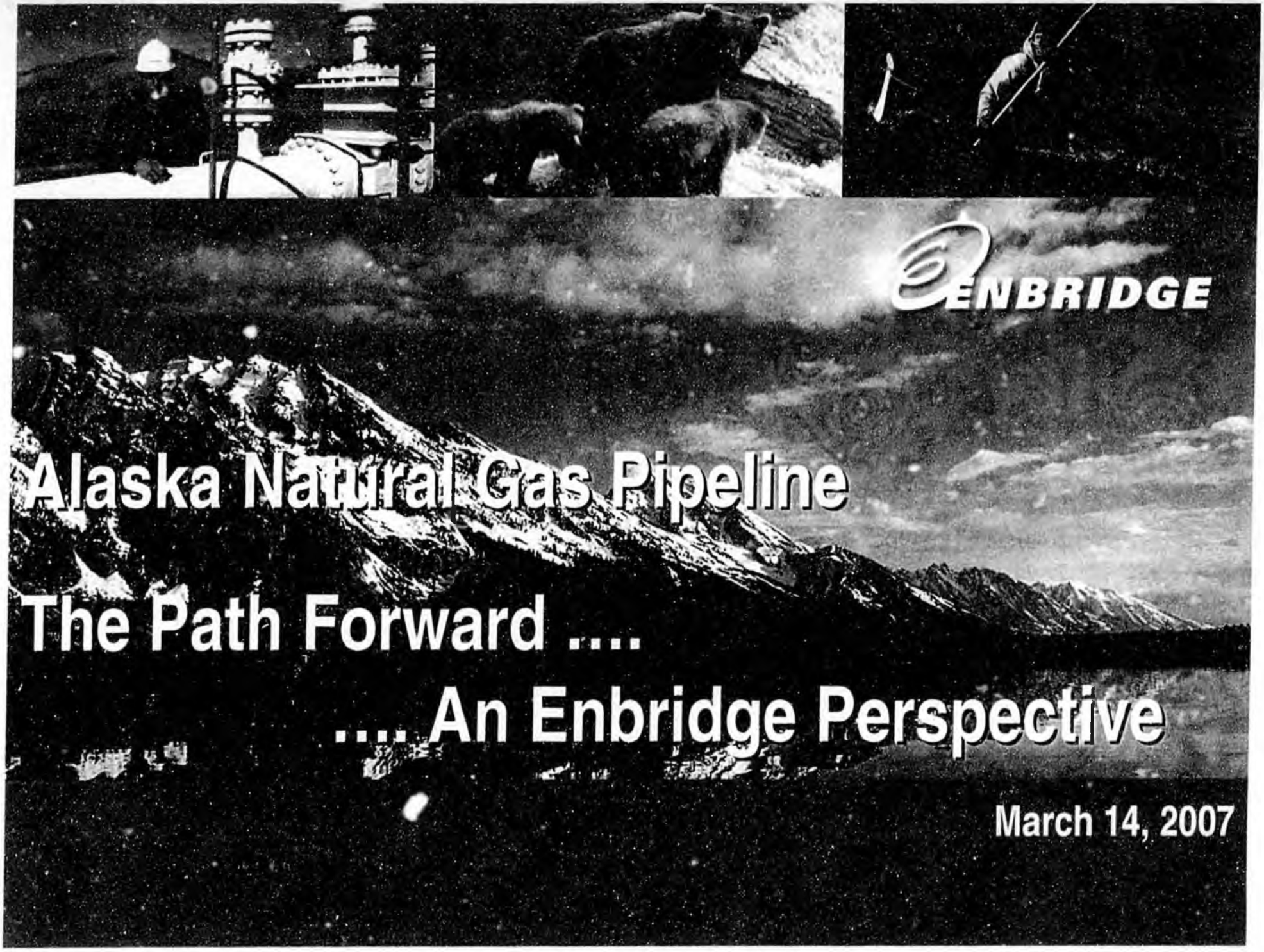
Signature of Camera Operator

6-4-2009

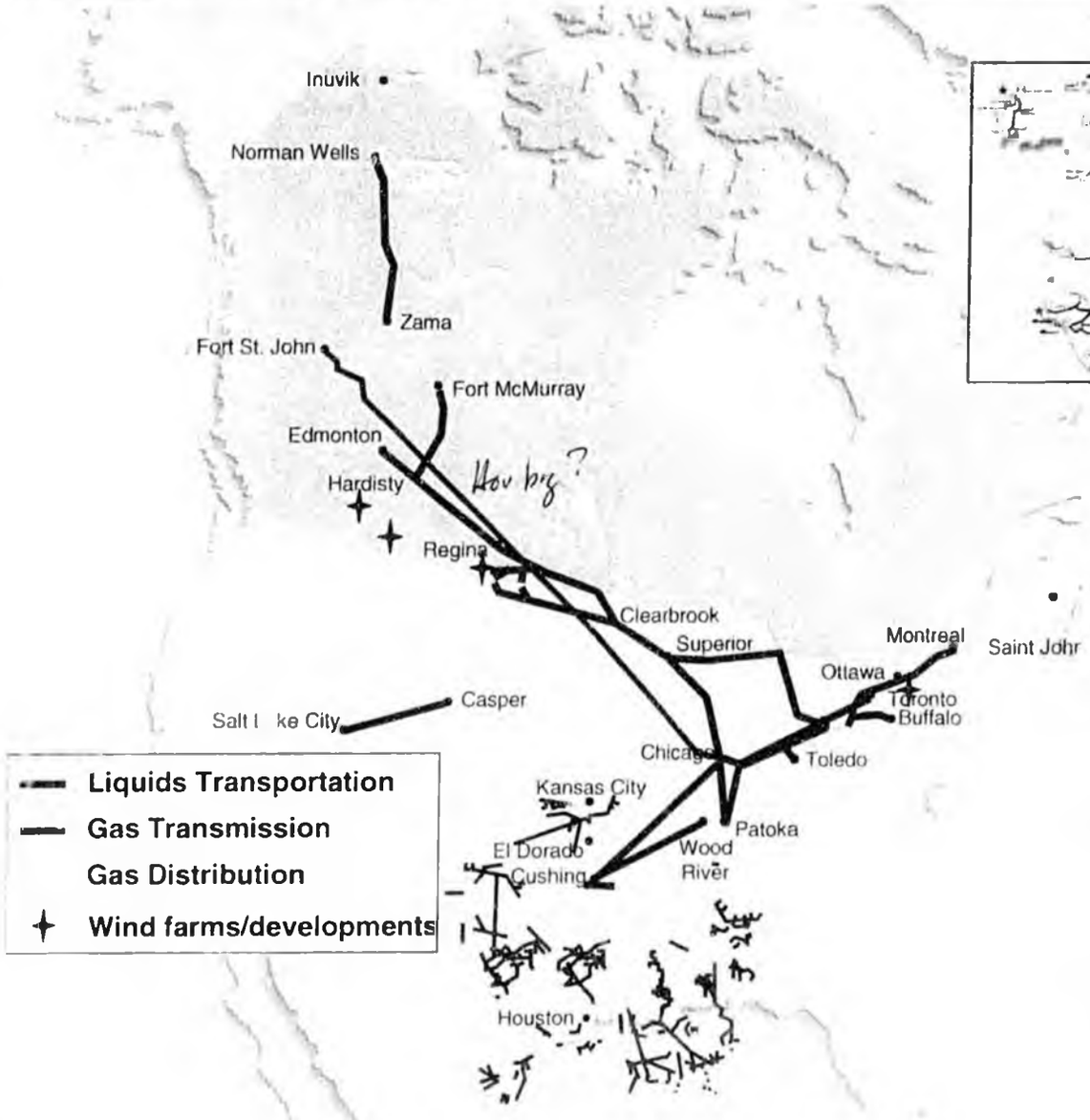
Date

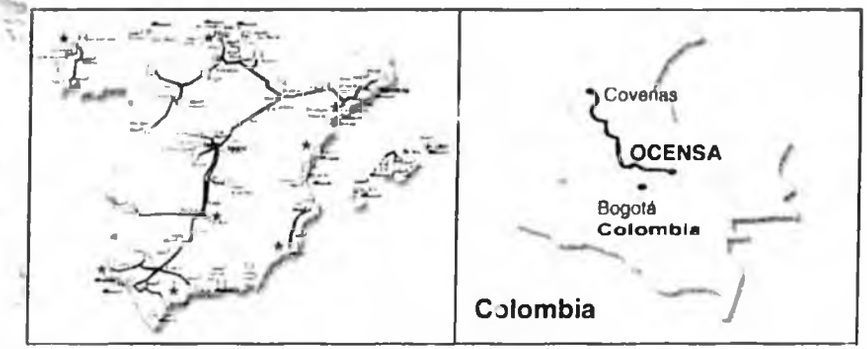
Certification Rev. 7/98

3/14/07 PRESENT-ATION: ENBRIDGE


ENBRIDGE
Alaska Natural Gas Pipeline
The Path Forward ....
.... An Enbridge Perspective
March 14, 2007

Enbridge Overview





- Interest in 50,000 miles of pipelines
- Own and operate world's longest liquid petroleum pipeline
- Deliver 70% of WCSB crude oil production
- Deliver half of deep water Gulf of Mexico natural gas production
- Canada's largest natural gas local distribution company
- Employ 4,900 people
- One of the *Global 100 Most Sustainable Corporations in the World*

Gas Businesses

- **Natural Gas Business:**
  - 10,000 miles of natural gas gathering and transmission lines
  - Including processing, treating and gas liquids marketing
  - Seasoned technical and operating experience

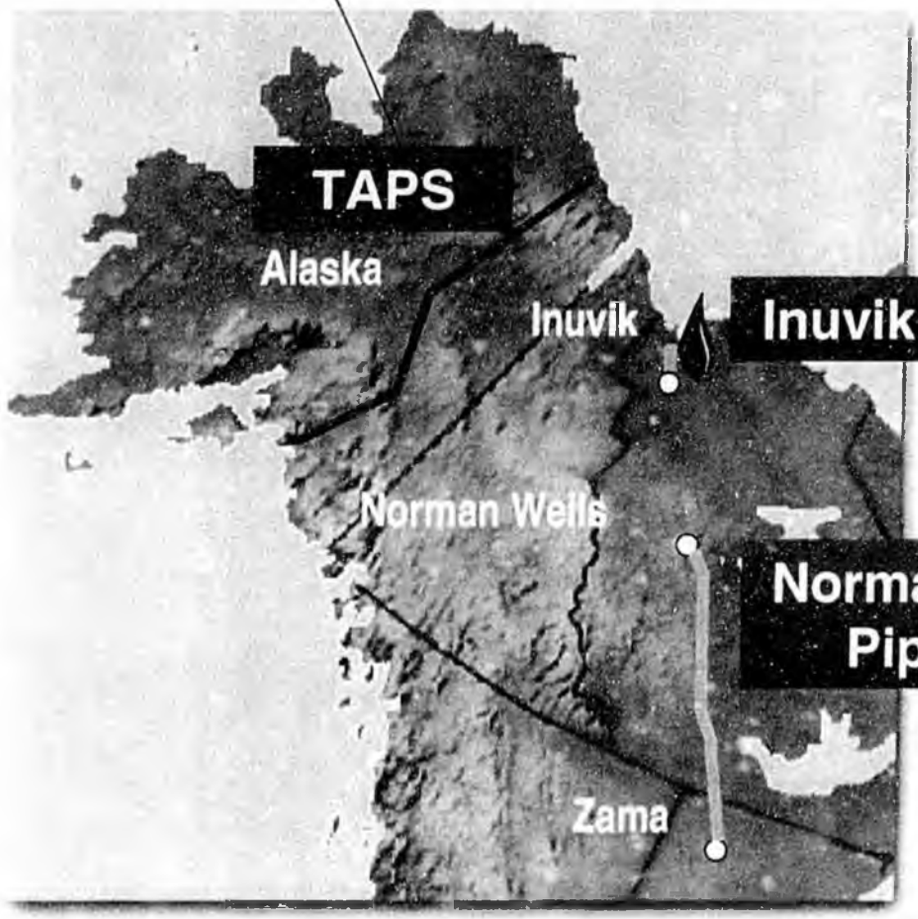
- **Joint Venture Partnerships - transporting over 2.6 billion cubic feet per day**
  - 50% owner of 1,857-mile Alliance Pipeline in service since 2000
  - 42.7% interest in Aux Sable liquids processing plant near Chicago
  - 60% owner and operator of 348-mile Vector Pipeline

- **Own Canada's largest local distribution company**
  - Serving 1.7 million industrial, commercial and residential customers in eastern Canada and northern New York State

- **Move half of Gulf of Mexico natural gas production**
  - Transport approximately 2.5 billion cubic feet per day
  - Serving technically challenging production from water depths that exceed 1 mile

Substantial Northern Expertise

- **Providing technical services**



- **Wellhead to Burner Tip service**
- **Natural gas production and distribution**
- **First in Arctic Canada**
- **Joint Venture with AltaGas & Inuvialuit Petroleum**

- **First significant buried pipeline in permafrost**
- **540-mile built in 1985**
- **40% employees indigenous descent**
- **19 years experience operating in permafrost**

Corporate Social Responsibility

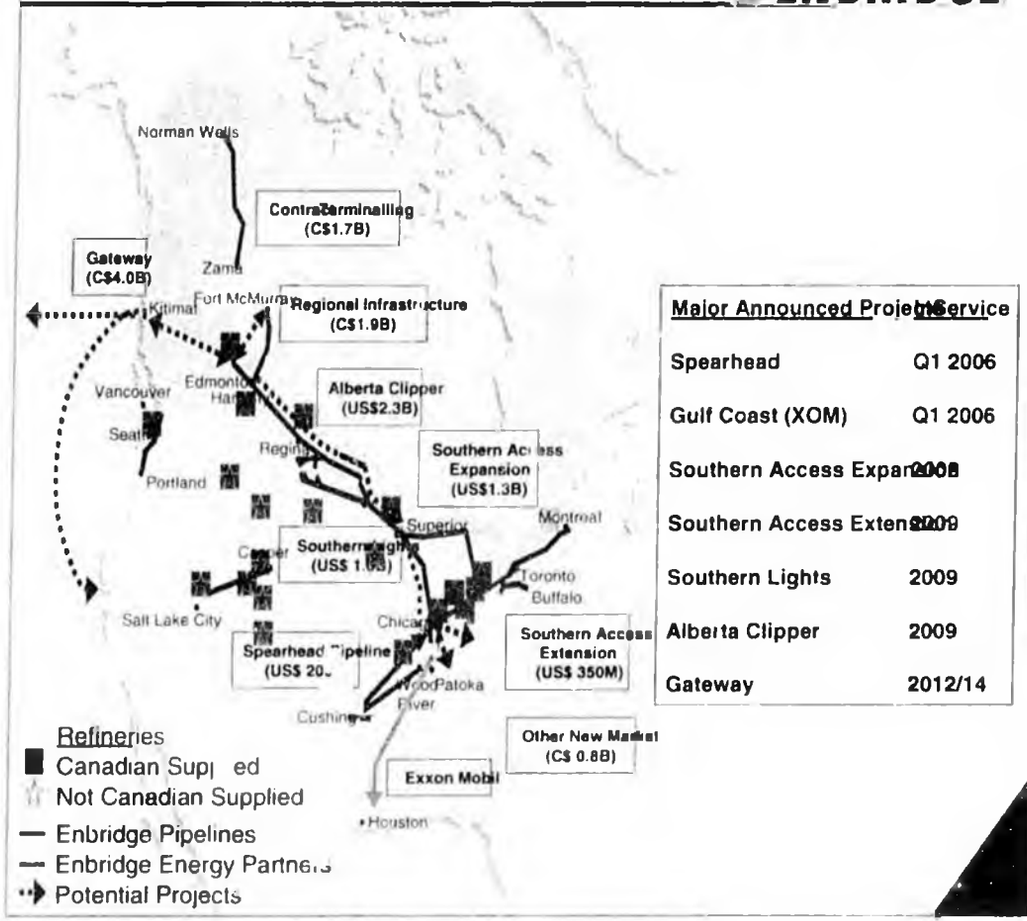
- One of only five Canadian companies chosen as the "Global 100 Most Sustainable Corporations in the World"
- Listed on the Dow Jones Sustainability Index
- One of Canada's Top 100 Employers, and one of Alberta's Top 20 Employers [Maclean's and Alberta Venture Magazines]
- One of the "Clean, Green 22" – the 22 Canadian companies leading sustainability practices [Canadian Business Magazine]
- One of the 50 best corporate citizens in Canada [2006 Corporate Knights Magazine]

Unparalleled Experience
Recent Pipeline Development

- $15 billion over the next 10 years
  - Unmatched recent experience managing labor, construction, procurement, environment, regulatory and cost-control challenges
  - Today's development environment is substantially different than 10 years ago
- Alliance Pipeline
  - Technical and commercial similarities

Proposed Pipeline Development

ENBRIDGE



Major Announced Projects	In Service
Spearhead	Q1 2006
Gulf Coast (XOM)	Q1 2006
Southern Access Expansion	2008
Southern Access Extension	2009
Southern Lights	2009
Alberta Clipper	2009
Gateway	2012/14

"As we move forward, I am guided by **five principles** that I believe can be **applied to all pipeline decisions**:

- First, they **must not interfere with market forces.** We will **let the market decide.**
- Second, our decisions must be **supportive of a modern regulatory regime.**
- Third, there must be a **project management approach**.
- Fourth, the **pipelines must support Aboriginal economic development.**
- Finally, decisions **must ensure that Canadian benefits are realized.**"

Honourable Jim Prentice

Minister of Indian Affairs and Northern Development

Presentation to Canadian Energy Pipeline Association Annual Dinner

May 2006

Regulatory Regimes

- **Depending on the project that is advanced, there are two possible regulatory processes:**

1. **ANGTA and NPA**
   - **Regulatory and legislative uncertainty**
   - **Pre-certification permits not exclusive**
   - **Must be updated with today's environmental assessment and stakeholder consultation requirements**
2. **Natural Gas Act (FERC) and National Energy Board Act (NEB)**
   - **Similar FERC and NEB processes and timelines**
   - **Accommodates permitting and stakeholder involvement from local, state and other federal agencies**

First Nations Rights

- Treaty Rights, Land Claims and Consultation
- Aboriginal and treaty rights were recognized and protected in Canada's Constitution in 1982 (approx. 10 years after passage of Northern Pipeline Act ("NPA") and the granting of permits there under)
- Since 1982 numerous court decisions have continued to further define and expand the scope of aboriginal and treaty rights
- Aboriginal rights, including legal obligation to consult
- Some First Nations own the land along the pipeline route

First Nations Engagement

- Education – Pipeline 101
- Meaningful Consultation
  - Early engagement
  - Understanding and minimization of physical and socio-economic impacts
- Ensuring significant, reliable and long term benefits through:
  - Training
  - Business and employment opportunities
  - Potential for equity participation in the project
- British Columbia and Yukon First Nations have voiced serious concerns about the NPA.
- Alaska pipeline will not face same issues as Mackenzie pipeline

Key Markets for Alaska Gas

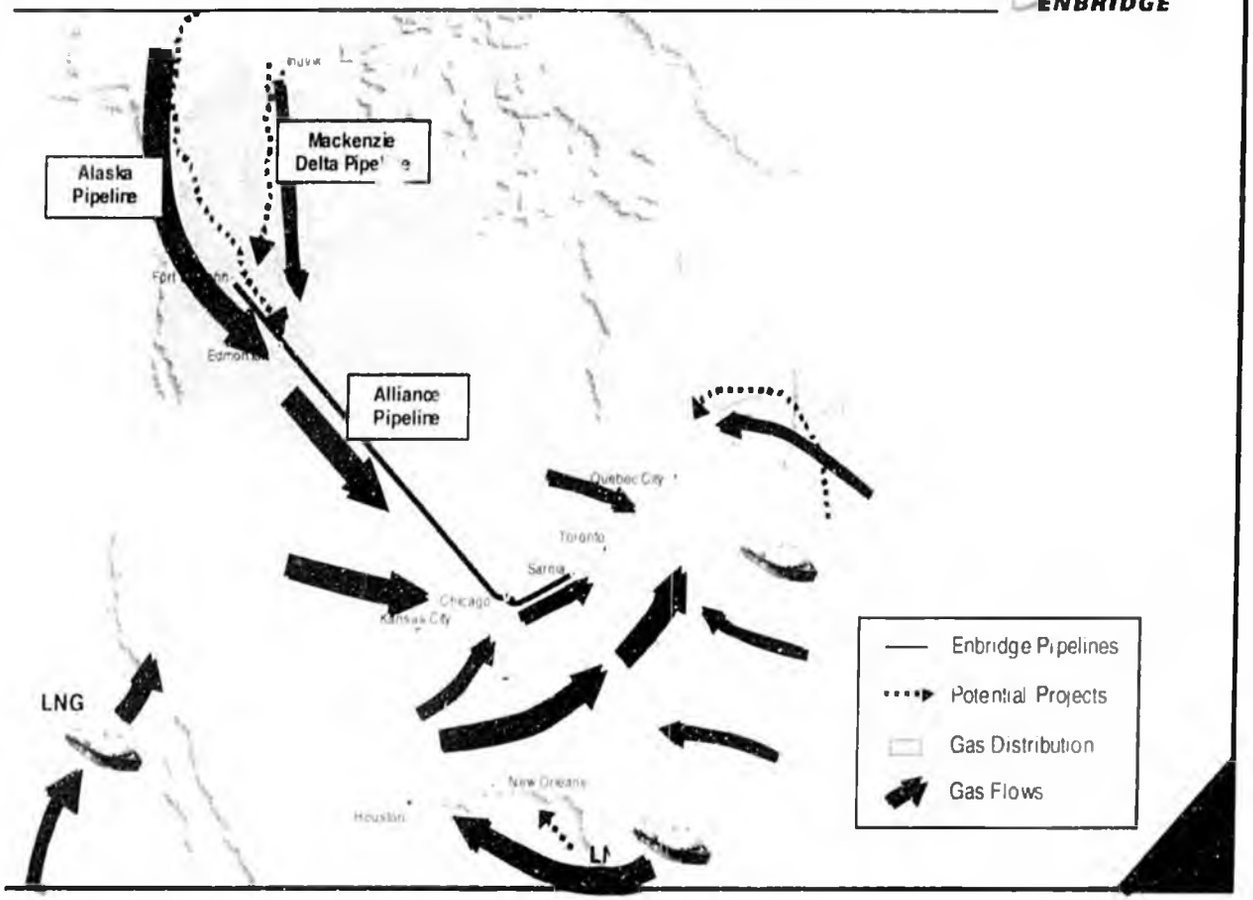
ENBRIDGE

Majority of the demand is expected to come from:

- US Midwest (Chicago hub)
- US Northeast
- Central Canada (Southern Ontario)
- Alaska

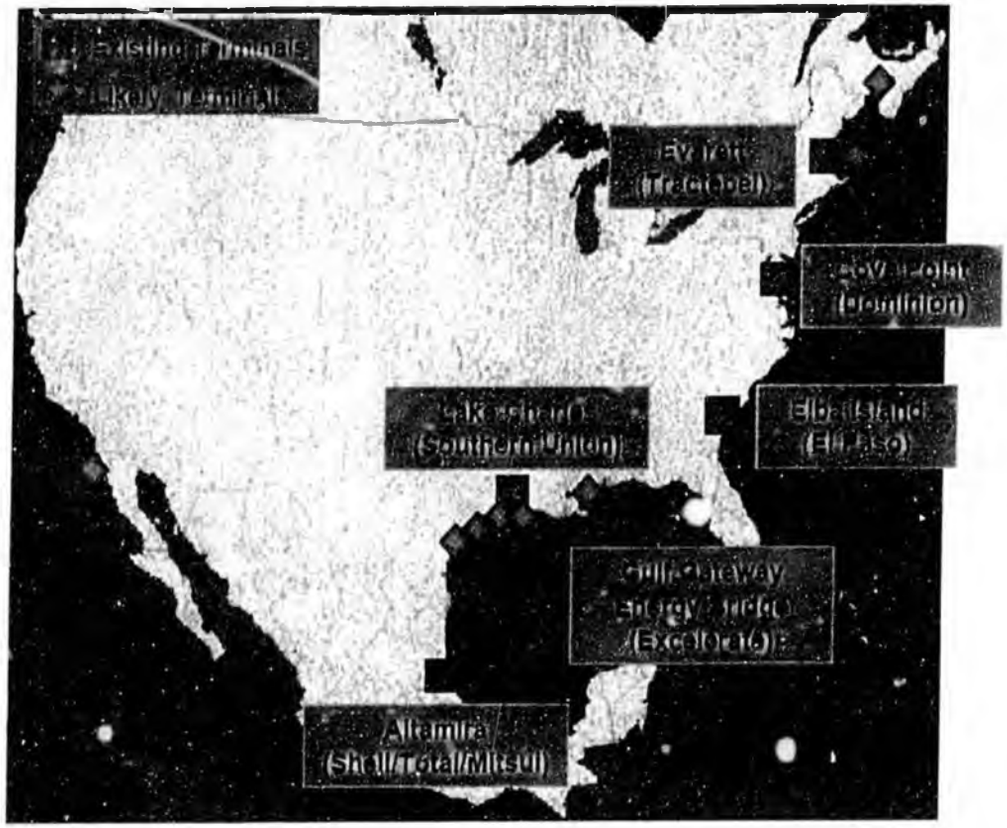
Gas Strategy
Supply/Demand Fundamentals

ENBRIDGE



LNG Existing and Proposed

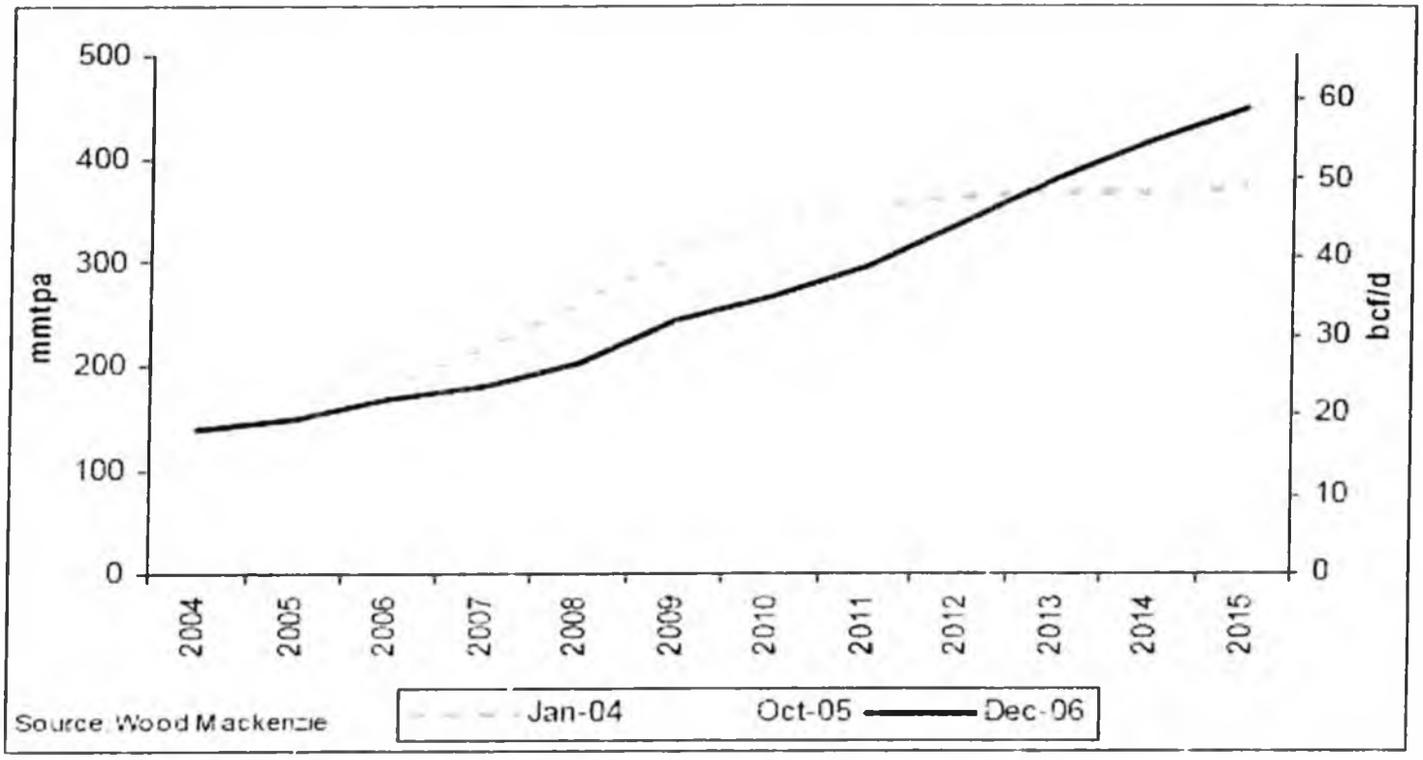
- Likely North America LNG Terminals by 2012



- North America will compete for LNG in a world market linked to oil pricing
- Asia & Europe have little storage and will bid away LNG during high demand seasons
- Limited opportunity for new terminal capacity required out to 2015

Bottlenecks in develop

- **Global LNG Supply Forecast 2004, '05, '06**



Recent Producer Involvement In Pipelines

- **Motives for Producer Ownership**

  Two over-arching motives:

  - ❖ **Get the project moving through extensive financial resources and previous experience**
  - ❖ **Development of resources**

  If producers take initial equity positions in the transport, the tendency is to sell their equity positions to transport companies once the above over-arching objectives are satisfied.

  Exceptions exist where the properties are strategic (e.g.. EnCana in Northeast B.C.)

Producer Ownership (Existing Pipelines)

Alliance Pipeline (Natural Gas)	**Project was initially fully sponsored by producers. Alliance is now owned by Transportation and Processing Companies (Enbridge and Fort Chicago equal partners)**
Maritimes & Northeast (Natural Gas)	**Imperial/ExxonMobil initially backstopped a larger portion of the M&NE project, but has sold down their position: Spectra (77.53%), Emera (12.9%), and ExxonMobil (9.55%)**

Recent Pro… Involvement In Pipeli…

Cutback Ridge Play (Natural Gas)	EnCana maintains 100% ownership of the pipeline which connects into Alliance near Wembley to capture this strategic Northeast B.C. play and direct resources east.
Entrega (Natural Gas)	EnCana sold 100% of the pipeline to Kinder-Morgan in February 2006, and is now the first leg of Kinder's proposed Rockies Express
Express Pipeline Partnership (Crude)	Initially a wholly owned affiliate of AEX (an EnCana predecessor) to bring crude from Hardisty, Alberta to Billings, Montana, which is an important U.S Rockies refining center. The pipeline was sold to a consortium of transport companies and a pension fund

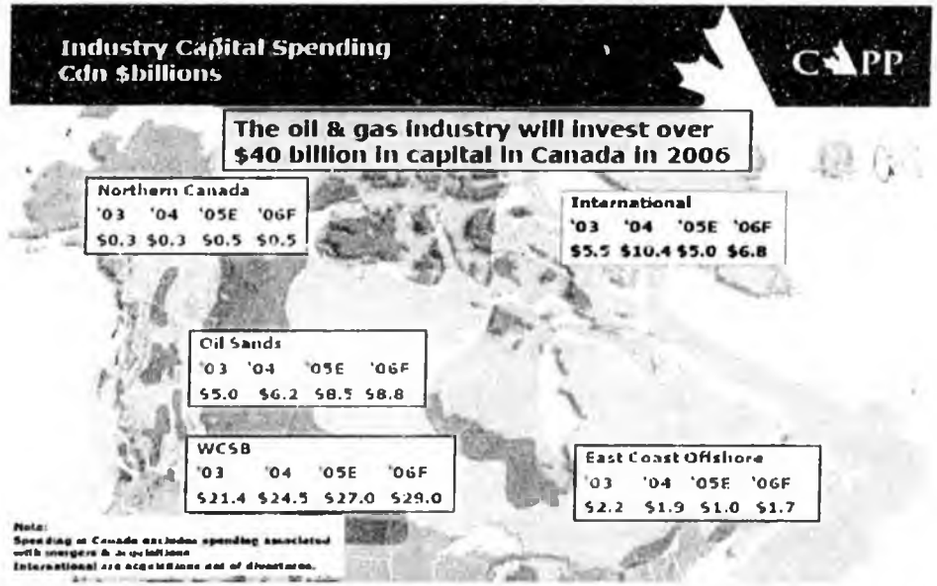
Producer Ownership (Planned/Under Construction)

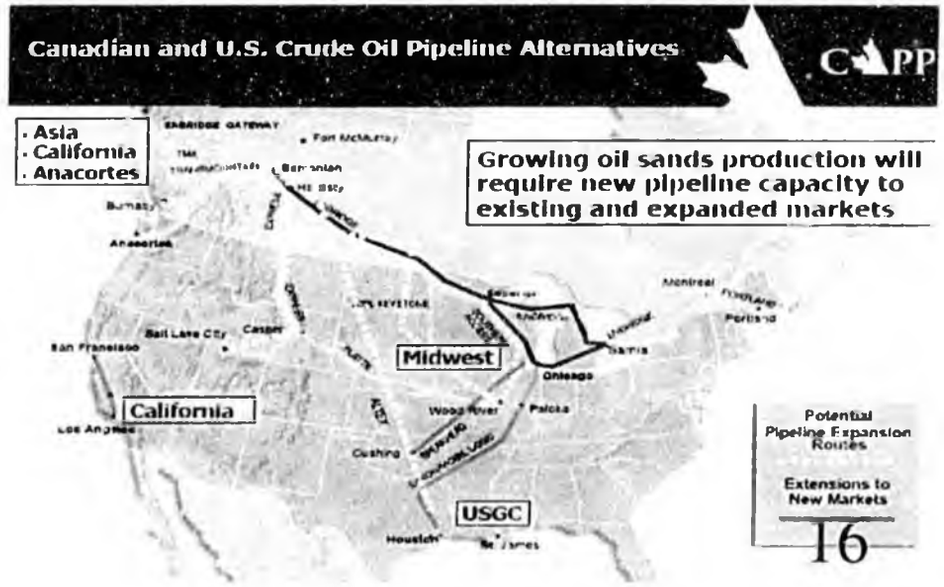
Rockies Express (Natural Gas, Under Construction)	ConocoPhillips is a large capacity holder in Rockies Express and recently exercised an option to obtain 25% equity in the project, alongside Kinder-Morgan and Sempra.
Mackenzie Valley (Natural Gas, Proposed)	Interest is almost entirely held by Imperial/ExxonMobil, Shell and ConocoPhillips. Imperial will construct and operate the MV gathering system as well as the pipeline which is expected in-service post-2012.

Canadian Oil Sands [illegible] Valuable Lessons

ENBRIDGE

- **Investment of $125 billion**
  - Significant new employment, tax revenue, long term growth
  - Extensive new pipeline development
- **Resulted from proactive progressive political vision that facilitated development**
  - Worked cooperatively with industry
  - Generating greater returns for all





Conclusion /

- State – Producer alignment

  (No producers No pipeline)

  - Timing is Key – market degredation/capital competition
  - Focus on what is essential vs. what is desirable

- Understand…

  - Producers' goals/motivations
  - North American supply/demand fundamentals
  - Regulatory protections already in place
  - Other players who can add value

- **North American has their eye on Alaska**

  - "The governor's proposal has to succeed or else I think an Alaska gas pipeline will slip for a number of years." FERC Chairman Joseph Kelleher