

May 6, 2013

The Honorable Sean Parnell
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: SCS CSSSHB 4(FIN) -- Alaska Gasline
Development Corporation
Our file: JU2013200204

Dear Governor Parnell:

At the request of your legislative director, we have reviewed SCS CSSSHB 4(FIN), relating to the Alaska Gasline Development Corporation; establishing the Alaska Gasline Development Corporation as an independent public corporation of the state; establishing and relating to the in-state natural gas pipeline fund; making certain information provided to or by the Alaska Gasline Development Corporation and its subsidiaries exempt from inspection as a public record; relating to the Joint In-State Gasline Development Team; relating to the Alaska Housing Finance Corporation; relating to judicial review of a right-of-way lease or an action or decision related to the development or construction of an oil or gas pipeline on state land; relating to the lease of a right-of-way for a gas pipeline transportation corridor, including a corridor for a natural gas pipeline that is a contract carrier; relating to the cost of natural resources, permits, and leases provided to the Alaska Gasline Development Corporation; relating to procurement by the Alaska Gasline Development Corporation; relating to the review by the Regulatory Commission of Alaska of natural gas transportation contracts; relating to the regulation by the Regulatory Commission of Alaska of an in-state natural gas pipeline project developed by the Alaska Gasline Development Corporation; relating to the regulation by the Regulatory Commission of Alaska of an in-state natural gas pipeline that provides transportation by contract carriage; repealing the statutes relating to the Alaska Natural Gas Development Authority and making conforming changes; and exempting property of a project developed by the Alaska Gasline Development Corporation from property taxes before the commencement of commercial operations

The bill would establish the Alaska Gasline Development Corporation (AGDC) as a public corporation and government instrumentally located, for administrative purposes, in the Department of Commerce, Community, and Economic Development, to advance an

in-state natural gas pipeline, as described in the July 1, 2011, project plan prepared under former AS 38.34.040. The bill would have an immediate effective date. For organizational purposes, this review is arranged by topic rather than by section.¹

I. AGDC established.

The bill would create a proposed new chapter 25 in AS 31 establishing the AGDC, formerly a subsidiary of the Alaska Housing Finance Corporation (AHFC), as an independent public corporation of the state with a legal existence independent of and separate from the state. AGDC's purpose, for the benefit of the state, is to advance an in-state natural gas pipeline project described in the project plan of July 1, 2011, developed under former AS 38.34.040 to make natural gas, propane, and other hydrocarbons associated with natural gas (other than oil) available to Fairbanks, the Southcentral region, and other communities in Alaska at the lowest rates possible. (proposed new AS 31.25.070) The AGDC must endeavor to develop a natural gas pipeline or other transportation systems to deliver natural gas at commercially reasonable rates to in-state public utility and industrial customers and to shippers that produce the products in the state. The AGDC cannot be terminated as long as it has bonds, notes, or other obligations outstanding. (proposed new AS 31.25.010)

Proposed new AS 31.25.020 would establish the AGDC's governing board of directors which would consist of five public members and two principal department heads appointed by the governor to serve five-year terms at the pleasure of the governor. In appointing the public members, the governor shall consider the individual's relevant expertise and experience, including natural gas pipeline construction, operation and marketing, finance, and large-project management. The public members would receive \$400 for each day spent on official business in addition to reimbursements for necessary expenses under AS 39.20.180. In appointing principal department heads, the provision purports to limit the governor from designating the

¹ The bill has 27 sections. Sections 1 and 25 of the bill express legislative intent to transfer Alaska Gasline Development Corporation, currently a subsidiary of the Alaska Housing Finance Corporation (AHFC), into an independent AGDC public corporation established under sec. 3 of the bill. Section 4 of the bill would exempt AGDC from the State Procurement Code. Section 2 of the bill would repeal AHFC's authority to create an in-state natural gas pipeline subsidiary. Sections 5 - 7 of the bill are conforming provisions. Sections 8 - 13 of the bill relate to right-of-way lease provisions. Section 14 of the bill would exempt AGDC and its subsidiaries from the State Personnel Act. Section 15 of the bill would apply public official financial disclosure provisions to the boards of directors of AGDC and its subsidiaries. Section 16 of the bill would exempt AGDC and its subsidiaries from the Alaska Public Records Act for information that is confidential by law or under a valid confidentiality agreement. Sections 17 - 21 relate to regulation by the Regulatory Commission of Alaska (RCA). Section 22 of the bill would exempt in-state gas pipeline property from property taxes during construction. Section 23 of the bill would repeal the Alaska Natural Gas Development Authority (ANGDA) and also repeals the Joint In-State Gasline Development Team. Section 24 of the bill would repeal 2002 Ballot Measure No. 3, which created ANGDA. Section 26 of the bill would provide revisor's instructions and sec. 27 of the bill would provide for an immediate effective date.

commissioners of revenue and natural resources to the board unless the project licensed under AS 43.90 has been abandoned, is no longer receiving the inducements in AS 43.90.110(a), or the commissioners are no longer signatories on a valid contract under AS 43.90.

In addition, proposed new AS 31.25.020(a) would provide that the governor's appointments of public members to the board of directors are to be subject to legislative confirmation. However, under the governor's constitutional appointment powers, art. III, sec. 26, of the Alaska Constitution, only when a board or commission is at the head of a principal department or a regulatory or quasi-judicial agency are the governor's appointments subject to legislative confirmation.² Insofar as the provision for legislative confirmation of the public board members may raise separation of powers questions under the Alaska Constitution, the Department of Law has previously recognized that because the executive is free as a matter of comity to acquiesce in what amounts to the legislature's request for more active oversight, the constitutional question does not necessarily arise.³

II. AGDC's powers and duties.

Proposed new AS 31.25.080 would establish the powers of the AGDC, including authority to issue bonds and notes (limited to the AGDC's backing) to finance and construct an in-state pipeline and facilities, create subsidiaries, transfer or dispose of all or part of the in-state pipeline and the AGDC's assets to public or private entities, independently exercise eminent domain, hire independent legal counsel and financial advisors, operate the pipeline as a contract or common carrier, and generally do all things necessary, convenient, and desirable to carry out powers expressed and implied in the bill. The AGDC may invest or reinvest funds held by the AGDC, including funds held in the in-state natural gas pipeline fund established under proposed new AS 31.25.100. Proposed new AS 31.25.080 would provide the AGDC with express authority to enter into derivatives or contracts such as an interest rate swap or hedge to insure against rising cost of materials (such as steel) or interest rates that could significantly increase the overall cost of the project.

Under proposed new AS 31.25.080(b), it is incumbent on the AGDC that upon commencement of construction of an in-state natural gas pipeline, the AGDC shall analyze potential natural gas pipelines and other transportation mechanisms connecting customers in other regions of the state, and, if AGDC determines it to be in the best interest of the state and is able to meet the needs of utility customers at commercially reasonable rates, the AGDC may finance, construct, or operate a natural gas pipeline or other transportation mechanism. Proposed new AS 31.25.080(f) also would require the AGDC, to the maximum extent possible, to coordinate with and accommodate developers of a large-diameter pipeline (diameter of 42 inches or more) by planning for development and use of common facilities. However, the AGDC may not develop or construct a natural gas pipeline that is a competing natural gas pipeline for the

² See *Bradner v. Hammond*, 553 P.2d 1, 5 (1976) (Section 26 of the Alaska Constitution vests the power of appointment in the governor).

³ 1998 Alaska Op. Atty. Gen. 122, Page 2, 1999 WL 638618 (Alaska A.G.), on review of SCS CSHB 393(FIN).

purposes of AS 43.90.440 (a provision of the Alaska Gasline Inducement Act), nor expand a pipeline to become a competing pipeline. A competing pipeline would be a pipeline designed to transport more than 500 million cubic feet of gas a day as described in AS 43.90.440. See proposed new AS 31.25.080(c) and (f), AS 38.35.121(c), AS 42.08.300(d), and 42.08.370(a).

Proposed new AS 31.25.090 would require state departments, agencies, and public corporations to give priority to requests by the AGDC for information relating to an in-state natural gas pipeline and to give priority to processing those requests. State entities must provide nonhydrocarbon natural resources and a permit or lease to the AGDC at the usual and customary rates, except the Department of Natural Resources must, under certain conditions, grant the AGDC a right-of-way lease for the gas pipeline transportation corridor at no appraisal or rental cost; with the approval of the commissioner of the natural resources, the right-of-way lease may be transferred (under the same terms and conditions) to a successor in interest. The cost of providing the natural resources or issuing a permit or entering into a lease that the AGDC incurs for an in-state natural gas pipeline project wholly or partially owned by the AGDC may not be included in the rate base in a proceeding before the Regulatory Commission of Alaska (RCA) or the Federal Energy Regulatory Commission.

Proposed new AS 31.25.120 would give the AGDC authority to create subsidiary corporations for the purpose of developing, constructing, operating, and financing in-state natural gas pipeline projects, aiding in these projects, or marketing the state's royalty share of natural gas production. The AGDC may transfer its assets to a subsidiary. A subsidiary created under this section may borrow money and issue bonds as evidence of the borrowing. However, debts, liabilities, and obligations of the subsidiary are not debts, liabilities, and obligations of the AGDC.

Proposed new AS 31.25.140(b) would require the AGDC and subsidiaries of the AGDC annually to submit a proposed operating budget to the office of management and budget for inclusion in the governor's annual operating budget as required under AS 37.07 (Executive Budget Act). In turn, the AGDC must comply with the uniform accounting rules under AS 37.05 (Fiscal Disclosure Act) for the expenditure of funds appropriated for its operating budget. Under AS 37.05.170, funds approved for the operating budgets may be used only in accordance with the appropriation. In accounting for the AGDC's corporate assets, the AGDC is required to submit to the legislature an annual report identifying its assets and whether the assets exceed an amount required to fulfill the purpose of the AGDC. The annual report must be audited by an independent auditor.

Article 1 in AS 31.25 would add proposed new sections to exempt the AGDC and its subsidiaries from several state laws and requirements. AS 31.25.065 would exempt the AGDC from AS 39.25 (State Personnel Act). AS 31.25.090 would grant authority to AGDC to hold confidential certain information created or held by the AGDC in an exemption under AS 40.25.100 - 40.25.295 (Alaska Public Records Act). AS 31.25.130 would exempt the AGDC from AS 44.62 (Administrative Procedures Act), other than the provisions of AS 44.62.310 - 44.62.319 (Open Meetings Act).

III. In-state natural gas pipeline fund.

Proposed new AS 31.25.100 would establish the in-state natural gas pipeline fund (fund) in the AGDC to hold money that is appropriated by the legislature to the AGDC. The proposed new section would authorize the AGDC to determine who manages the fund, and AGDC may contract with the Department of Revenue for fund management. This section would make clear that money appropriated to capitalize the fund, including investment income appropriated back to the fund, can be expended by the AGDC without further appropriation for the planning, financing, development, acquisition, maintenance, construction, and operation of an in-state natural gas pipeline and for the cost of managing the fund. Finally, money remaining in the fund after completion of the project does not lapse to the general fund until this section is repealed.

IV. Authority of AGDC to issue bond and notes.

Article 2 in AS 31.25 would include nine proposed new sections that relate to the AGDC's authority to issue bonds and notes to finance an in-state natural gas pipeline. Under AS 31.25.160, the AGDC would be authorized to issue revenue-backed bonds and bond anticipation notes, in one or more series, for the purpose of financing an in-state natural gas pipeline and pledge revenue generated from the project or received by the AGDC, mainly tariffs, as a source of repayment for the bonds. So, should the AGDC default on the repayment of these bonds, because the revenue stream pledged is insufficient to cover the annual debt service on the bonds, the state will not be obligated legally or morally to cover this revenue shortfall or remedy the default. Under AS 31.25.240, there is unambiguous language that clearly provides that debts of AGDC are not debts of the state. Because getting natural gas to Alaskans at the lowest possible rate is the point of this project, should the AGDC determine, following an open season, that the terms at which it could issue revenue-backed bonds are too expensive, i.e. high interest rates, the AGDC can return to the legislature and request legislative approval to issue moral obligation debt as provided in AS 31.25.190. AS 31.25.190 contains the structure necessary to issue moral obligation debt, but absent legislative approval, this credit enhancement mechanism is not available to the AGDC. Finally, under AS 31.25.230, AGDC would be authorized to refinance outstanding bond debt through the issuance of refunding obligations. Typically refunding obligations are issued when interest rates have dropped sufficiently to cover the cost of issuance and still result in a cost savings by paying off the outstanding bonds with the proceeds of new securities.

Article 3 in AS 31.25 includes four proposed new sections that provide general provisions relating to the AGDC. AS 31.25.250 would exempt board members from personal liability for official actions taken while serving on the AGDC board; AS 31.25.260 would exempt AGDC from state and municipal property taxes; AS 31.25.270 would require AGDC to prepare and submit an annual report to the governor and legislature that includes an audited financial statement and provide on its Internet website an annual income statement and balance sheet; and, AS 31.25.390 would provide a definition section for AS 31.25.

In addition, sec. 4 of the bill would amend AS 36.30.850(b) exempting the AGDC and its subsidiaries from AS 36.30 (State Procurement Code), and sec. 22 of the bill would amend AS 43.56.020 to exempt taxable property of a natural gas pipeline project owned or financed by

AGDC or any entity that includes AGDC from state and municipal taxes under AS 43.56.010 before commencement of commercial operations of that natural gas pipeline project.

V. Alaska Public Records Act exemption.

Proposed new AS 31.25.090 would grant authority to the AGDC to hold confidential certain information created or held by the AGDC. The AGDC is authorized to enter into confidentiality agreements with private entities and public agencies; and, the portions of records containing information acquired or provided by the AGDC under such agreements are not subject to the Alaska Public Records Act (APRA). The following information is confidential and not subject to the APRA: information of the AGDC that would cause commercial or competitive harm or damage to the AGDC if disclosed and information that discloses the particulars of a business or affairs of certain private persons that is developed or obtained by the AGDC and related to the creation or existence of an in-state natural gas pipeline project by the AGDC. Under specified conditions, the AGDC may waive certain confidentiality protections. Under this section, when the pipeline project becomes operational, the AGDC must make available under the APRA certain records that were exempt from disclosure, unless maintaining confidentiality is necessary to protect the economic interests of the AGDC or the state, or disclosure will violate another provision of state law, a federal law or regulation, or a confidentiality agreement or other agreement that is binding on the AGDC.

Section 16 of the bill would amend AS 40.25.120(a) to add an exception to the requirement of the APRA that public agencies disclose public records. Specifically, the parts of public records containing information of the AGDC or a subsidiary of the AGDC that is confidential by law or under a confidentiality agreement are not subject to inspection under the APRA.

VI. Amendments to the Alaska Right-of-Way Leasing Act; establish contract carriage.

Sections 3 and 8 - 13 of the bill would make significant changes affecting AS 38.35 (Alaska Right-of-Way Leasing Act). Under existing AS 38.35, any person seeking to build or operate a pipeline over state land must have a right-of-way lease from the state. AS 38.35 sets out the public process that must be used by the Department of Natural Resources upon receipt of an application for a right-of-way lease, the factors the commissioner of natural resources must consider in deciding whether a lease should be granted, the rental payment required for the lease, certain covenants designed to protect the state's interest that must be included in a lease, and the conditions a person must meet to have a right to challenge a decision of the commissioner of natural resources in court. The bill would make changes to all of these considerations with regard to the AGDC.

Process and costs: Existing AS 38.34.050(c) requires the Department of Natural Resources to issue a right-of-way lease to AHFC provided certain conditions are met. In sec. 3 of the bill, proposed new AS 31.25.090(d) would replace AHFC with AGDC and modify the conditions set out to allow for the possibility of issuing a lease with the new contract carrier covenants described below. It also provides that the lease to the AGDC will be issued without appraisal or rental costs. This language is potentially ambiguous in that it is not clear whether

the exception to the normal AS 38.35 requirement that the state charge a fair market rental applies to a lease initially issued to AGDC but later transferred to a third party.

Lease covenants: Under existing law, a right-of-way lease is not valid unless it includes certain covenants designed to protect the state as set out in AS 38.35.120. These covenants require the lessee to act as a common carrier, maintain records and allow the state access to its records and property for inspection purposes, construct and operate the line in accordance with the requirements of the RCA, seek permission from the commissioner of natural resources before transferring a right-of-way lease, and accept liability for injury to the state and other persons resulting from the pipeline. The bill would allow leases to be issued for gas lines, but not oil lines, without the covenants relating to common carriage obligations, i.e. the requirements to transport without discrimination oil and gas at rates determined to be just and reasonable by the RCA, interchange oil or gas with like pipelines, and provide connections as determined by the RCA.

The bill would create a new set of covenants in proposed new AS 38.35.121 for exempt contract carrier pipelines. The proposed new covenants also would address nondiscrimination, interchange, and required connections, but in each case the lessee's obligations are limited by its contracts with shippers. The lessee will also be obligated to expand a line on commercially reasonable terms, but will not be permitted to expand if the effect of the expansion would be to become a "competing natural gas line project" under AS 43.90.440 (Alaska Gasline Inducement Act).

Judicial review: Proposed new AS 38.35.200 would limit standing to challenge decisions of the commissioner of natural resources to issue a pipeline right-of-way lease to applicants, competing applicants, and those with a direct financial interest in the project who commented within the comment period provided for in AS 38.35. The bill would further restrict standing to challenge decisions relating to an AGDC pipeline. For AGDC pipelines, standing by third parties to challenge decisions would be limited to claims alleging that an action will deny rights under the Constitution of the State of Alaska and then only if those claims are brought within 60 days of the challenged action. Moreover, it would broaden, for AGDC gas pipelines, the scope of actions for which standing is restricted. The existing AS 38.35.200 restricts standing only to challenge decisions of the commissioner of natural resources relating to the issuance of a right-of-way lease. For AGDC, this bill's standing limits apply to any decision of any state official relating to the planning, financing, acquisition, maintenance, development, construction, or initial operation of a pipeline. The Alaska Supreme Court has not considered the constitutionality of judicial review provisions as those in proposed new AS 38.35.200.

An additional effect of this limitation on standing is to leave some existing permit requirements unenforceable in court by the third parties they are intended to benefit. For example, the commissioner of natural resources compliance requirements to consult with communities or indigenous people that are part of some permits issued for a typical pipeline could not be challenged by those communities or indigenous groups under the proposed new AS 38.35.200.

VII. RCA.

The RCA currently economically regulates public utilities⁴ and pipelines⁵ under a comprehensive scheme that includes broad authority to examine and, if necessary, modify or invalidate business practices in those regulated industries. The bill would create a new category of regulated entity called an in-state natural gas pipeline carrier (for simplicity, referred to as a contract carrier).⁶ Regulation of contract carriers under the bill would be superficially similar to existing RCA regulation, but in practical effect is dramatically different with the result that RCA has limited authority over contract carriers under proposed new AS 42.08.⁷

A. Contract carriage.

The central regulatory premise of the bill is the concept that, although pipelines are generally monopoly service providers, the contract carrier and shippers should be able to negotiate the prices and other commercial terms of their relationship. This includes the ability for the contract carrier to offer firm service to shippers, and to contract for differing priorities among shippers. According to sponsor testimony, the contracts are likely to contain take-or-pay provisions for terms of 20 to 30 years, largely to facilitate acquisition of long-term financing.

B. Sequence of regulatory actions.

To further facilitate financing, under the bill the regulatory process for contract carriers is heavily front-end loaded. Although a public utility or pipeline ordinarily seeks initial regulatory approval by filing an application for a certificate of public convenience and necessity (CPCN). In the case of a contract carrier, a number of regulatory actions may precede the CPCN application. First, the contract carrier must file for RCA approval an initial recourse tariff that contains the general terms and conditions of service, estimated cost of service-based rates that may be elected by shippers in lieu of negotiating rates (if capacity is available), and open season procedures. Second, under specified circumstances, the contract carrier may be required to conduct an open season. Third, the contract carrier (and public utility shippers, if any) must file precedent agreements⁸ for approval by the RCA. Fourth, the contract carrier may concurrently

⁴ AS 42.05 (Alaska Public Utilities Regulatory Act).

⁵ AS 42.06 (Pipeline Act).

⁶ Regulation of contract carriers, set out in sec. 21 of the bill, would be codified under AS 42.08.

⁷ All other provisions in proposed new AS 42.08 must be read in conjunction with AS 42.08.220, which enumerates the authority over contract carriers granted to, and withheld from, the RCA.

⁸ Precedent agreements are essentially conditional firm transportation service agreements. The conditions are subject to negotiation, but may include such things as timeframe for financing and building the pipeline, and that the actual costs of construction fall within a specified range.

with, or prior to, filing precedent agreements, file a revised recourse tariff. Finally, the contract carrier, presumably after securing financing, must apply for a CPCN. Following issuance of the CPCN, economic regulation of contract carriers, except for possible open seasons, resembles traditional regulation in the sense that recourse tariff revisions must be submitted for approval and some types of complaints related to the contract carrier may be brought to the RCA for resolution.

C. Initial and revised recourse tariff for a contract carrier.

The bill would provide that before entering into a binding agreement of any sort, a contract carrier must file an initial recourse tariff for approval. Unlike review of tariffs for utilities and common carrier pipelines, the review process for a contract carrier is limited to approval or disapproval, the scope of review is limited, and the time for RCA action (a 90-day notice and review period, plus up to a 30-day suspension period) is so much shorter that, in practicality, it eliminates the adversarial process normally used to develop the factual record necessary for a reasoned decision.

Recourse tariff revisions must also be filed for RCA approval, but with only a 90-day notice and review period. Unlike under the RCA's other jurisdictional statutes, a recourse tariff revision cannot be suspended for investigation.

Both initial and revised recourse tariffs for a contract carrier are reviewed under a narrow standard. Contract carrier recourse tariffs are reviewed only to determine that the terms and conditions are not unduly discriminatory. Recourse tariff rates and rate design are not reviewed for discrimination, nor are rates subject to the traditional just and reasonable standard. Normally, tariff review requires that the RCA look at the revenue requirement, throughput and rate design. Instead, under proposed new AS 42.08.350(b), the RCA is directed to look only at two of the six traditional revenue requirement elements: depreciation (including method and depreciable life) and rate of return (including capital structure). The RCA has no authority to review operating expenses, allowance for taxes, dismantlement, removal, and restoration,⁹ or rate base, which make up the remainder of the revenue requirement formula. The RCA also lacks the authority to review throughput and rate design, the remaining inputs needed to calculate cost-based rates.

D. Open seasons.

Open seasons must be held under two circumstances: available capacity and expansion (AS 42.08.300). The initial open season, if any, is a special case of an available capacity open season. Because under the bill the contract carrier would be permitted to execute presubscription agreements in advance of open season, it is possible that no open season will be held if all available capacity is presubscribed. With limited exceptions for North Slope natural gas pipelines, under existing law open seasons are not required of public utilities and common carrier pipelines.

⁹ Dismantlement, removal, and restoration allowance, which is used to ensure that the lease obligations to restore the right of way can be met.

E. Precedent agreements.

Under the bill, precedent agreements (and "related contracts," which are public utility contracts for the natural gas commodity and storage) must be submitted for RCA approval. Except for precedent agreements involving public utilities, precedent agreements may be filed under seal. While the standard for approval is nominally "just and reasonable," precedent agreements (and related contracts) are conclusively presumed to be just and reasonable if "arm's length" and not the product of "unlawful market activity ... or unfair dealing." (AS 42.08.320) For this purpose, arm's length is defined far more broadly than the ordinary meaning of the term. The contents of a precedent agreement are not subject to any review if the agreement is arm's length. Once approved, a precedent agreement is not subject to further RCA review.

F. CPCN.

Although the proposed new contract carrier regulatory scheme (proposed new AS 42.08) would apply to all contract carriers regardless of ownership, at present there is, on the effective date of the bill, only one corporation, AGDC, authorized to be a contract carrier, and the legislature makes formal findings that AGDC is financially and managerially fit to operate a pipeline, and that the public convenience and necessity require the service AGDC will offer. (AS 42.08.020) The RCA is left to determine whether AGDC is technically fit. Any applicant for a CPCN other than AGDC must prove all traditional elements for issuance of a CPCN, and all CPCN holders, including AGDC, must apply for prior approval to transfer or sell the certificate or to discontinue service.

G. Dispute resolution.

Most disputes involving contract carriers and shippers are permitted to be resolved by either contractual or tariffed procedures that need not include the RCA or judicial review. The RCA has some limited role in resolving disputes involving a complainant that is not an existing shipper, an actual or imminent emergency that involves a public utility, or an available capacity or expansion open season. The timelines are very short (60 days for open season disputes, 150 days for all others), and must be brought "within 60 days after the event giving rise to the complaint." (proposed new AS 42.08.220)

H. Funding for RCA and regulatory affairs and public advocacy (RAPA).

The proposed RCA funding mechanism in the bill would be a regulatory cost charge, which is similar to that used in the RCA's other jurisdictional statutes. However, as applied to contract carriers, very little of the cost of regulation will be recovered because the amount of regulatory cost charge is tied to prior fiscal year costs, limited by a percentage of contract carrier gross revenue. As noted above, the process is heavily front-loaded, so that in practice the significant regulatory costs would be incurred years before the contract carrier has any gross revenue. In other words, in years immediately following chargeable costs, the lack of gross revenue will cap the regulatory cost charge at zero, while in years when significant gross revenue is being earned there will have been little to no regulatory cost incurred. (proposed new AS 42.08.380)

I. Triennial reports and the operating reserve fund.

The bill would require that the contract carrier must file triennial reports with the RCA containing an updated cost study and a calculation of the three-year average actual return on equity. The RCA is required to review the cost study. The contract carrier must create and fund an "operating reserve fund" if its average actual return on equity exceeds the "approved rate of return." The contract carrier may draw on the fund in years when it experiences a "shortage in the recovery of operating costs." If the fund balance exceeds 20 percent of the average operating expenses, the contract carrier must reduce its rates on a volumetric basis for all firm transportation customers. This mechanism is extremely unusual, perhaps unprecedented, in regulated industries because it violates several traditional ratemaking principles. In practical effect, it may result in past shippers subsidizing future shippers, and it may also reinforce existing cross-subsidies between rate classes. In other words, the shippers who overpaid may not be the shippers who receive the benefits of the operating reserve fund. (proposed new AS 42.08.450)

J. Judicial review.

Because proposed new AS 38.35.200(c) is worded inclusively (and is cross-referenced in proposed new AS 42.08.530(a)), RCA actions before "initial operation" of a pipeline operated by AGDC may not be subject to judicial review. Those RCA actions include review of the initial recourse tariff, approval of precedent agreements and related contracts, issuance of a CPCN and construction permit, and possibly one or more recourse tariff revisions. Coupled with the abbreviated administrative processes prescribed for those actions, how the courts will interpret and enforce this provision is uncertain.

RCA decisions are generally subject to judicial deference on matters of agency expertise, and historically review has been based solely on the administrative record. However, the abbreviated processes in proposed new AS 42.08 may result in an appeal de novo under AS 44.62.570(d) if the record is incomplete as a result of short timelines or lack of opportunity for interested parties to participate. In addition, there are potential statutory violations (e.g., unlawful provisions in an arm's length precedent agreement) that the RCA has no authority to investigate or remedy. Such violations might be subject to original actions in superior court.

VIII. Conclusion.

Our review of SCS CSSSHB 4(FIN) has not identified any constitutional or other legal concerns that would preclude enactment.

Sincerely,

Michael C. Geraghty
Attorney General