FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

OFFICE OF THE CHAIRMAN

March 15, 2010

Robert Swenson
Project Manager
Alaska In-State Gas Resources
411 Fourth Street
Anchorage, AK 99501

Dear Mr. Swenson:

I am writing in response to your January 28, 2010 letter sent in your capacity as the project manager for the in-state natural gas pipeline project being studied by the State of Alaska. Your letter amended a November 19, 2009 letter from your predecessor as Project Manager, Mr. Harry Noah, describing options being considered for an in-state pipeline to bring natural gas from Alaska's North Slope to meet gas demand in southern Alaska, and seeking guidance regarding under what circumstances the Federal Energy Regulatory Commission, as opposed to the Regulatory Commission of Alaska, would have jurisdiction over the proposed facilities. I appreciate the opportunity to consult with Alaska authorities on the issue of an in-state natural gas pipeline, because I am well aware that the need to make economic energy supplies available to Alaska's residents is a matter of great concern within the state.

I have enclosed with this letter an analysis by my staff of the issues raised in your and Mr. Noah's letters. The analysis represents staff's best judgment, based on the scenarios presented in the letters. Of course, if and when the Commission itself is asked to rule formally on these or similar issues, the Commissioners will have to reach their own decisions on the matters presented to them. Please feel free to contact me and my staff at any time about matters of concern to Alaska. Should you have further questions regarding this response or staff's analysis, please contact Mr. John Katz, Deputy Associate General Counsel for Energy Projects, at (202) 502-8082.

Sincerely,

Jon Wellinghoff
Chairman

Enclosure

COMMISSION STAFF REVIEW OF JURISDICTIONAL ISSUES RELATING TO ALASKA IN-STATE NATURAL GASLINE

This document responds to the January 28, 2009 letter from Mr. Robert Swenson, Project Manager for the State of Alaska's study of a potential Alaska in-state natural gas pipeline (in-state pipeline), amending a November 19, 2009 letter from Mr. Swenson's predecessor, Mr. Harry Noah.

As explained in the letters, the primary purpose of the in-state pipeline would be to transport natural gas from Alaska's North Slope to serve local domestic and industrial needs in Alaska as those needs arise over time. Mr. Swenson seeks to confirm under what circumstances the Federal Energy Regulatory Commission (FERC), as opposed to the Regulatory Commission of Alaska (RCA), would have jurisdiction over the proposed facilities.

Mr. Swenson's letter provides the following information: Alaska is investigating the cost of a pipeline that would parallel the route of the Dalton Highway from the North Slope and then follow the Parks Highway to the area of Cook Inlet. A second option is a route that would parallel the Dalton Highway from the North Slope and then follow the Richardson and Glenn Highways to the Cook Inlet area. In either case, the pipeline would be a high-pressure facility (2500 pounds per square inch), with a capacity of between 0.25 and 1.0 billion cubic feet per day. The pipeline would commence at the outlet of a conditioning plant and terminate at or near tidewater in Cook Inlet, where it would interconnect with an RCA-regulated intrastate pipeline in the Anchorage area. The pipeline would not directly interconnect with the existing, FERC-regulated Kenai Liquefied Natural Gas (LNG) facility, although it might connect to existing pipelines that themselves connect to the Kenai facility.

Mr. Swenson's letter presents three scenarios with respect to the ultimate use of the natural gas transported on the in-state pipeline, and asks for confirmation of the jurisdictional implications of each hypothetical case. Commission staff describes and analyzes each scenario below in light of two sections of the Natural Gas Act (NGA) – NGA section 7, which establishes the Commission's jurisdiction over the construction and operation of interstate natural gas pipelines, and NGA section 3, which establishes the Commission's jurisdiction over facilities used for the import or export of natural gas in foreign commerce.

Scenario 1

In the first scenario, all of the North Slope gas transported by the in-state pipeline would be sold to end-users who would consume the gas entirely within Alaska.

Under these circumstances, Commission staff agrees with Mr. Swenson's conclusion that no authorization would be needed from the Commission for construction and operation of the in-state pipeline.

Scenario 2

Under the second scenario, while some of the North Slope gas transported by the in-state pipeline would be sold to, and consumed by, end-users in Alaska, depending on local needs, some, and potentially a majority of, the gas would be sold to parties who would have it delivered, via connections with the existing intrastate grid, to the Kenai LNG facility for export to foreign markets. As support for the conclusion that the in-state pipeline would not be subject to Commission jurisdiction under this scenario, Mr. Swenson's letter references the Commission's order addressing a somewhat, but not entirely, similar situation in *Yukon Pacific Corporation.*[1]

In that case, Yukon Pacific Corporation was developing a proposal to construct a project, to be known as the Trans-Alaska Gas System (TAGS), to transport gas from the North Slope of Alaska through an 800-mile-long pipeline to a liquefaction plant at Valdez, for export to Asian markets. All of the natural gas flowing through the TAGS pipeline would have been exported exclusively into foreign commerce.[2] In its declaratory order addressing its jurisdiction over the contemplated project, the Commission recognized that the court in *Distrigas Corp. v. F.P.C.*[3] had held "that to prevent gaps in jurisdiction the Commission has the discretion under section 3 'to impose on imports of natural gas the equivalent of Section 7 certification requirements'" but "decline[d] to exercise any discretionary authority it may have under section 3 of the NGA to regulate the siting, construction and operation of the [800-mile] TAGS pipeline,"[4] reasoning that the project would have no economic consequences to U.S. ratepayers (as the costs of the project would be borne by the project sponsors, its lenders and investors, and its foreign purchasers of the gas) and that the environmental review process associated with the Commission's authorization of the liquefaction plant would provide the Commission ample opportunity to consider the environmental and safety aspects of the pipeline.

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[1] *Yukon Pacific Corporation* (*Yukon Pacific*), 39 FERC ¶ 61,216 (1987).

[2] *Id.* at p. 61,753.

[3] 495 F.2d 1057, 1064 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 834 (1974).

[4] *Id.* at p. 61,759.

Subsequent to the Commission's consideration of the jurisdictional implications of the Yukon Pacific project in 1987, Congress enacted the Energy Policy Act of 2005 (EPAct 2005),[5] which added a new section 3(e) to the NGA, providing, in part, that "[t]he Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." As defined in section 2(11) of the NGA, as added by EPAct 2005:

> "LNG terminal" includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include –
>
> (A) waterborne vessels used to deliver natural gas to or from any such facility; or
> (B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.

Were the Commission to be faced with a proposal like the Yukon Pacific project today, it would have to address whether the 800-mile-long pipeline would be considered a "natural gas facilit[y] . . . used to . . . transport . . . natural gas . . . exported from the United States."

That same question is raised by the circumstances presented in Scenario 2. On the one hand, an argument can be made that the in-state pipeline in Scenario 2 would "transport" natural gas "exported to a foreign country." However, unlike the project in *Yukon Pacific,* Scenario 2 does not involve the construction of a clearly jurisdictional new (or expanded) liquefaction terminal, nor would the hypothesized in-state pipeline interconnect directly with the existing Kenai terminal. Rather, the pipeline would interconnect with existing intrastate pipelines that would in turn connect to the terminal. In addition, notwithstanding that much of the gas transported by the in-state pipeline might be exported in foreign commerce, the impetus for construction of the in-state line in Scenario 2 nevertheless would be to ensure adequate supplies to meet in-state Alaska demand. Also, similar to the situation in *Yukon Pacific,* it appears such a project would have no economic consequences for any U.S. ratepayers outside of the State of Alaska. In the absence of Commission regulation, it would appear that the RCA would have authority to regulate the in-state pipeline as an intrastate pipeline. The Commission

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[5]Pub. L. 109-58, 42 U.S.C. §15801 (2005).

would need to consider all of the foregoing in deciding whether it would be required to assert jurisdiction over the proposed pipeline.

Scenario 3

Under the third scenario described in Mr. Swenson's letter, some of the gas transported on the in-state pipeline would be sold to and consumed by Alaska end-users, but some be would sold to parties who would have it transported through existing intrastate pipelines to the Kenai facility, from whence it would be transported, as LNG, to foreign or lower 48 state markets (if an LNG receiving terminal were constructed on the U.S. west coast).

The distinction between Scenarios 2 and 3 is that in the former case, gas not used in Alaska is shipped to foreign markets, while in the latter some gas may be transported in domestic markets. The fact that some of the gas in Scenario 3 might be transported in interstate commerce (from Alaska to one or more of the lower 48 states) could result in the proposed in-state pipeline becoming fully subject to the Commission's NGA jurisdiction. The potential that the commingling of gas for intrastate use with gas that will flow out of the state of production could cause the entire gas stream (and facilities used to transport it) to become subject to section 7 of the NGA and the Commission's jurisdiction was first recognized in 1965 in *California v. LoVaca.*[6] At that time, the U. S. Supreme Court had already articulated in *Interstate Natural Gas Company Inc. v. FPC*[7] the principle that where the Commission has jurisdiction has over the interstate transmission of natural gas, that jurisdiction does not begin at the point at which gas first crosses a state line; rather, it begins at upstream points wherever NGA gathering ends.[8]

It is also possible that the Commission would exercise limited jurisdiction over the interstate service posited by Scenario 3, but not the facility itself, under section 311 of the Natural Gas Policy Act of 1978. Section 311(a)(2) of the NGPA provides that an intrastate pipeline can transport gas in interstate commerce without its facilities and intrastate services becoming subject to the Commission's NGA jurisdiction. That is because section 601(a)(2)(A) of the NGPA provides that for purposes of section 1(b) of the NGA, which sets forth the Commission's jurisdiction over the transportation of gas in interstate commerce:

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[6] 379 U.S. 366 (1965).

[7] 331 U.S. 682 (1947).

> the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply to any transportation in interstate commerce of natural gas if such transportation is . . . (ii) authorized by the Commission under [NGPA] section 311(a).

However, the Commission has held that the NGPA's definition of "intrastate pipeline" excludes newly constructed pipelines, since prior to operation they could not qualify as "engaged in" transportation.[9] Thus, the Commission has never found that a company can qualify as an intrastate pipeline without having first established the intrastate character of existing operations in the state where the pipeline is located.[10] But the Commission has also never ruled on how long an intrastate pipeline must have been in operation as such in order to shield its status as an intrastate pipeline while also offering interstate services under section 311 of the NGPA. Nor has the Commission to date ruled that once an intrastate pipeline begins offering interstate services under section 311 of the NGPA, its continued intrastate pipeline status depends on its continuing to provide some specified level or percentage of intrastate service. Nevertheless, the Commission might have reason to question the jurisdictional nature of a new pipeline company that purportedly commenced service as an intrastate pipeline, only to undertake the provision of a substantial amount of service in interstate commerce shortly thereafter under section 311 of the NGPA.

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[9]*See Lee 8 Storage Partnership*, 73 FERC ¶ 61,159 at p. 61,477 (1995).

[10]*Id.* at p. 61,479, *citing Midcoast Ventures I*, 61 FERC ¶ 61,029 at p. 61,158 (1992).

SEAN PARNELL
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STATE OF ALASKA
OFFICE OF THE GOVERNOR

January 28, 2010

The Honorable Jon Wellinghoff
Chairman
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Dear Chairman Wellinghoff,

On November 19, 2009, Harry Noah, the former project manager for Alaska's in-state natural gas pipeline project, sent a letter requesting FERC's assistance in answering jurisdictional questions surrounding Alaska's investigation for in-state delivery of North Slope natural gas. Since then, however, there have been several new developments in the deliverability of Cook Inlet gas. Please accept this letter as an amended version of Mr. Noah's original letter to reflect these changes. As you know, Alaska is committed to the exploration of natural gas delivery, and we look forward to your response concerning the jurisdictional questions outlined below.

Alaska's desire for this study stems from the possibility of deliverability shortfalls in the Anchorage area that might arise in the future under certain scenarios. Historically, the demands for energy in the Anchorage area have been supplied by Cook Inlet production, but due to the natural decline of the reserves base, lack of significant drilling activity, and subsequent loss or potential loss of industrial base-load has resulted in a strain on the economics of maintaining deliverability capacity. In the future, meeting mid-winter demand spikes in the high-swing domestic market will require significant investment in wells and storage projects which will put upward pressure on consumer gas prices. A recently released study by the Alaska Department of Natural Resources outlines this current understanding of Cook Inlet gas resources[1]. The Federal Energy Regulatory Commission's (FERC) most recent report to Congress on the interstate Alaska gas pipeline project also references the State's investigation of in-state options[2].

A top priority of Governor Parnell and his administration is to see an interstate gas pipeline through to completion. An interstate gas pipeline is vital not only to Alaska's future, but also the energy future of our nation. My request for guidance from FERC on in-state pipeline issues in no way should be understood as detracting from that commitment. We want to make sure that Alaskans do not fall short in meeting their needs for natural gas.

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1 "Preliminary Engineering and Geological Evaluation of Remaining Cook Inlet Gas Reserves," report submitted to the Alaska Department of Natural Resources by the Alaska Division of Oil and Gas, December, 2009, 37p., available at http: www.dog.dnr.state.ak.us oil .

2 "Eighth Report to Congress on Progress Made in Licensing and Constructing the Alaska Natural Gas Pipeline," report submitted to the United States Congress by the Federal Energy Regulatory Commission, August 26, 2009, pp 5-6.

Our overall question is to confirm and clarify under what circumstances FERC, as opposed to the Regulatory Commission of Alaska (RCA), would have jurisdiction. It is important for the State in evaluating the alternatives to understand what approval processes apply and which regulatory agencies will exercise jurisdiction over a completed in-state pipeline. I am writing, therefore, to ask if you can confirm our understanding regarding possible FERC jurisdiction with respect to the resource use scenarios that would result from delivering North Slope gas to the Cook Inlet basin on either of two possible pipeline routes.

The State of Alaska is currently investigating the cost components of a pipeline that parallels the route of the Dalton Highway from the North Slope and then follows the Parks Highway to the area of Cook Inlet. A second option is a pipeline that will parallel the route of the Dalton Highway from the North Slope and then follow the Richardson and Glenn Highways to the Cook Inlet area. In either case, the pipeline would commence at the outlet of a conditioning plant and end at or near tidewater in Cook Inlet where it would interconnect with an existing RCA-regulated intrastate pipeline in the Anchorage area.

In each case, the in-state pipeline would be a high-pressure pipeline (2500 psi) and would not receive gas from any interstate pipeline or foreign source of gas. The capacity of the line would be between ¼ and 1.0 bcf per day. Thus, physically the pipeline would begin and end in the state of Alaska and would never leave the state during the course of its journey from the North Slope to the Cook Inlet area. Nor would it directly connect to the existing FERC-regulated Kenai Liquefied Natural Gas (LNG) facility; although, given the nature of the Cook Inlet pipeline and distribution system, it might connect to existing pipelines that in turn connect to the Kenai LNG facility. During its journey on the in-state pipeline, North Slope gas might be withdrawn from the pipeline for consumption at intermediate destinations entirely within the state of Alaska as well as for the ultimate distribution in the Cook Inlet area and for export as LNG.

It should be noted that for more than four decades, and with the required federal approvals, Cook Inlet gas has been liquefied and shipped to Japan. Last January, your Commission clarified the scope of its jurisdiction under Section 3 of the Natural Gas Act over the Kenai LNG facility, confirming that FERC exercises jurisdiction over the citing, construction, operation, and maintenance of that LNG facility. The January order did not discuss, let alone assert, jurisdiction over the separate State-regulated pipelines that connect to the LNG terminal. The Kenai LNG facility factors into several of the scenarios where we seek your assistance. For the purpose of the questions being posed in this letter, none of the scenarios currently under investigation involve a new LNG terminal.

We appreciate that any export of gas would be subject to the U.S. Department of Energy (DOE) approval (under Section 3 of the Natural Gas Act), but our concerns are with the jurisdictional questions that may arise over a new in-state pipeline that transports gas – some, or much of which, depending on the time frame, may be exported through the Kenai LNG facility. Under these circumstances, we believe existing FERC precedent would recognize State, not federal, regulation of an intrastate pipeline that would connect to other pipelines that serve local distribution needs as well as LNG exports. We emphasize that, in each of the cases that follow, the primary objective of the in-state line is to serve local domestic and industrial needs in Alaska as those needs arise over time.

The first scenario with regard to the above pipelines would be the case where all of the gas flowing down the pipeline from the North Slope is sold to end-users who consume the gas entirely within the state of Alaska. We believe that, under this circumstance, there would be no question that the proposed pipeline would be an intrastate pipeline not subject to regulation by FERC. Please confirm that this is correct.

A second scenario would be that, depending on local needs, some of the gas transported from the North Slope to the Cook Inlet area would be sold to and consumed by end-users within the state of Alaska. However, some, and potentially a majority, of that gas might be sold or re-sold to parties that would export it to foreign markets through the Kenai LNG facility. This resembles the current practice for the Cook Inlet natural gas market today. In *Yukon-Pacific*, 39 FERC ¶ 61,216 (1987), the Commission notes that a proposed in-state pipeline that would feed a proposed LNG terminal at Valdez for foreign exports would not be subject to the Commission's jurisdiction. That ruling was earlier than the 2005 amendments to the Natural Gas Act but its logic would still appear to apply to the scenarios we describe here that would not involve construction of a new LNG terminal and would involve an in-state pipeline that would not itself directly connect to the existing LNG terminal.

We ask that you confirm that the addition of a supply of North Slope gas into the Cook Inlet natural gas and foreign export markets would have no effect on the current jurisdictional framework. Again, since any such gas being exported to foreign markets through the Kenai LNG facility would be delivered to the Kenai LNG facility by way of RCA-regulated intrastate pipelines that already deliver gas to the Kenai LNG facility for export, we ask that you confirm that the new in-state pipeline that would in turn deliver the export gas to the intervening intrastate pipeline would not be classified as FERC jurisdictional.

A third scenario with regard to the potential new pipeline from the North Slope would be that some of the gas transported from the North Slope to the Cook Inlet area would be sold to and consumed by end-users within the state of Alaska, but the balance of the gas might be sold to parties that would export it to foreign or Lower 48 markets through the Kenai LNG facility. The third alternative assumes the availability of an operational LNG terminal on the west coast of the United States at some point during the operation of the in-state pipeline. In those circumstances, the ultimate destination of LNG exports from the Kenai terminal would likely depend on the comparative attractiveness at a future date of Lower 48 and overseas markets. The path of gas to those markets would first pass through the in-state pipeline, continue through existing gas pipelines that are regulated by the RCA and then through the existing Kenai LNG facility. Portions of the gas stream from the in-state line would flow respectively to intrastate, interstate, and foreign destinations as needs and markets dictate and accordingly the destination ratios would vary over time. In the totality of the circumstances, we believe a strong case may be made that the in-state line should not be jurisdictional, but we seek the Commission's guidance on this question as well.

On behalf of the State of Alaska, thank you for the support of the Commission's staff in moving the interstate Alaska gas pipeline project forward. The visit of the Commission's staff in August 2009 to meet with State and local agencies, and their tour of the prospective pipeline routes, was helpful in spurring progress in TransCanada Alaska's pre-filing process with your Commission. It is also our understanding that the FERC staff is taking the steps necessary to produce an Environmental Impact Study for the TransCanada Alaska and Denali projects on the timeline defined by the Alaska Natural Gas Pipeline Act. TransCanada Alaska and Denali are also busy preparing for open seasons during 2010.

We greatly appreciate your assistance, and look forward to your response. Please do not hesitate to contact me at (907) 257-1352 if I can further clarify.

Sincerely,

Robert Swenson
Project Manager
Alaska In-State Natural Gasline

cc: Mike Nizich, Chief of Staff, Office of the Governor
John W. Katz, Director of State/Federal Relations, Office of the Governor
The Honorable Gene Therriault, Senior Energy Advisor, Office of the Governor
Robert H. Loeffler, Morrison & Foerster LLP