

RM05-1-000

Alaska State Legislature

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ORIGINAL

Representative Ethan Berkowitz

District 13

January 4, 2005

The Honorable Pat Wood, III
Chairman
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

FEDERAL ENERGY
REGULATORY COMMISSION

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OFFICE OF
EXTERNAL AFFAIRS

Re: Antitrust concerns with producer owned Alaska natural gas pipeline

Dear Chairman Wood,

As a member of the Alaska State Legislature, I hope that the upcoming legislative session will give us the opportunity to review contracts under the Alaska Stranded Gas Development Act. All Alaskans want to translate the momentum generated through the recently enacted Congressional incentives and actually begin building an Alaskan natural gas pipeline.

I want to thank the Commission for promulgating regulations concerning open seasons. Given the cost and complexity of this project, expeditious resolution of issues clears potentially fatal bottlenecks and encourages participation in the pipeline. The need to address another potential bottleneck issue prompts this letter.

My specific concern relates to the antitrust implications raised should the major producers own and operate the pipeline. They hold more than 90 percent of North Slope gas reserves and control almost 40 percent of Lower 48 gas markets. On its face, these levels of market share raise questions about antitrust that must be resolved before the State Legislature can responsibly determine how to respond to any application under the Stranded Gas Act. Presidential and Congressional directives and FERC orders suggest that the Commission has the authority to address the antitrust issues. From my perspective, a legislative decision made without benefit of answers could prove either a pointless waste of state and legislative resources or result in further delays and lost

opportunities. Simply, we need to know whether a producer owned and operated pipeline would pass legal muster.

My reading of the history leads me to believe that longstanding concerns about anti-trust and the Commission's roll in resolving those questions exist. The President's September 22, 1977, "Decision and Report to Congress on the Alaska Natural Gas Transportation System", makes it clear that the successful applicant to build the Alaska natural gas pipeline should exclude and prohibit producers of significant amounts of Alaska gas from participating in the ownership of the pipeline. Subsequently, on October 15, 1981, the President submitted a waiver of law to the Congress, which among other things resulted in a conditional waiver of this requirement. From the Alaska Legislature's perspective, those conditions are significant, especially regarding the process for reviewing antitrust issues. The waiver lifted the ban on producer ownership and provided that any ownership in an Alaska pipeline may be "approved by the Federal Energy Regulatory Commission only after consideration of advice from the Attorney General and upon a finding by the Federal Energy Regulatory Commission that the [ownership] will not (a) create or maintain a situation inconsistent with the antitrust laws, or (b) in and of itself create restrictions on access to the Alaska segment of the approved transportation system for nonowner shippers or restrictions on capacity expansion."¹ (emphasis added) (see Pub. L. No. 97-93, 95 Stat. 1204 (1981))

The antitrust oversight and requirements addressed in the 1977 and 1981 Presidential prohibition and waiver represent concerns that two Presidents and Congress had that a producer owned Alaska gas pipeline would remain consistent with antitrust laws. Both Presidents and Congress weighed and considered these antitrust restrictions before imposing them.

Even though the Presidential prohibition and waiver occurred in the context of the Alaska Natural Gas Transportation Act of 1976 ("ANGTA"), antitrust issues should be addressed in the case of an Alaska natural gas pipeline developed outside ANGTA's authority. Clearly, the Presidents and Congress had concerns that extended beyond a producer owned ANGTA pipeline. The concern was with certain Alaska producers owning an Alaska natural gas pipeline that could create a situation inconsistent with antitrust laws. Given the trajectory of market control, antitrust issues with ANS Producers seem to be more of a concern today than in 1981. The Commission should address those concerns in the way outlined by the Presidents and Congress. As often noted, ANS Producers control more than 90 percent of proven North Slope gas reserves. Their aggregate ownership percentages of all natural gas production in the lower 48 states has increased significantly in the past two decades, with ANS Producers reportedly controlling some 37 percent of North American markets. Furthermore, ANS producers' global LNG development interests, which are expected to significantly increase by the end of the decade, and their lower 48 production, compete with the development of Alaska gas. A delay in shipping Alaska natural gas could easily enrich the ANS producers, while the benefits that will come to Alaskans with the production of Alaska natural gas are forestalled, and the lower 48 states are forced to bear the burden of higher natural gas prices.

¹ The concern contained in item (b) should be resolved through the Commission's open season regulations.

Deregulation and light-handed regulation over entire segments of the energy supply chain has been the direction of energy policy over the past two decades. For example, the Natural Gas Wellhead Decontrol Act of 1989 removed price controls over natural gas production. Moreover, FERC Order Nos. 436 and 636 required unbundling of gathering, processing, interstate transportation and marketing of natural gas with cost-of-service regulation applied only to the interstate transportation segment. These developments occurred after the Presidential prohibition and waiver; however, considering that the size and scope of operations of ANS producers has increased dramatically as a result of mergers and acquisitions, it is again imperative to review antitrust considerations. A producer owned pipeline would again re-bundle all segments of the energy supply chain and provide producer control from wellhead to city-gate.

To reiterate, bringing Alaska gas to market as soon as possible requires knowing whether antitrust issues prevent ANS Producers from owning the Alaska natural gas pipeline to move Alaska gas to the lower 48 states. The Alaska State Legislature, which begins session January 10, depends on an answer to that question before we can responsibly review applications under the Stranded Gas Act. To this end, we respectfully request that the Commission address, with the Attorney General of the United States, the issue of whether the ANS Producers, given the history of prohibiting producer ownership, would be precluded from owning an Alaska natural gas pipeline to bring Alaska gas to the lower 48 states. Given time constraints and the fundamental nature of this issue, a response from the Commission by the end of January 2005, on whether an ANS Producer owned Alaska natural gas pipeline could create or maintain a situation inconsistent with antitrust laws, would be greatly appreciated. Again, we appreciate the Commission's attention to this matter and look forward to an early response.

If you have any questions, please feel free to contact me.

Sincerely,



Ethan A. Berkowitz

Cc: Governor Frank Murkowski
 Attorney General Gregg Renkes
 President of the Senate Ben Stevens
 Speaker of the House John Harris
 Senate Minority Leader Johnny Ellis
 Legislative Budget and Audit Co-Chair Senator Gene Therriault
 Legislative Budget and Audit Co-Chair Representative Ralph Samuels