



STATE OF ALASKA  
DEPARTMENT OF  
**COMMERCE**  
COMMUNITY AND  
ECONOMIC DEVELOPMENT

*Sean Parnell, Governor*  
*Emil Notti, Commissioner*  
*Robert M. Pickett, Chairman*

**Regulatory Commission of Alaska**

May 17, 2010

File: TA316-8  
LO#: L1000175

**Statement of Commission Paul F. Lisankie concurring, joined by Chairman Robert M. Pickett**

Last year I concurred in our approving, without investigation, the gas sales agreement between Chugach and ConocoPhillips. I expressed the opinion that, when a utility files a gas sales agreement for our approval, we must first decide (after reviewing the agreement, supporting documentation, and any comments we receive) whether or not to investigate it.<sup>1</sup> I explained that initial process as a consideration of whether the public interest<sup>2</sup> would be better served by approval of the agreement as filed or by suspension of the filing for investigation and hearing.<sup>3</sup>

If we do investigate and hold a hearing, I believe we would need to make a second decision, because a gas sales agreement is a "contract affecting" a rate. Such contracts are subject to the provisions of AS 42.05.431. Therefore, after any investigation and hearing, we must then determine whether the agreement in its entirety is consistent with those statutory provisions. If it is, it should be approved. If it is not, we are required to reject it and then determine and order

<sup>1</sup> Under AS 42.05.431 we have the authority to investigate a "contract affecting" a rate. I believe a gas sales agreement clearly falls under that authority. It is less clear why a request for approval of a gas sales agreement is considered a tariff matter. However, our practice has been to accept such requests as part of the tariff filing required for passing the costs flowing from the agreement (once approved) to customers through the utility's tariffed gas cost adjustment (if a gas utility) or cost-of-power adjustment (if an electric utility such as Chugach). Under AS 42.05.421(a) any tariff filing may also be suspended for investigation and hearing. I do not believe the substance of the approval process is affected but the timing certainly is. A tariff goes into effect unless suspended within 45 days. If permissible, I would prefer separating the two matters. In that way we could suspend the tariff within 45 days pending a more deliberate gas sales agreement approval process. If the gas sales agreement was then approved, within the applicable period under AS 42.05.175(i), allowing inclusion of the agreement's costs in the utility's tariff is essentially a ministerial action that could readily be accomplished by vacating the tariff suspension under AS 42.05.421(b).

<sup>2</sup> I consider our actions under the Alaska Public Utilities Regulatory Act subject to an inherent public interest standard applicable in the absence of an explicit one. Moreover, we have adopted an explicit public interest standard for deciding whether we should halt an ongoing investigation-hearing process based upon the stipulation and request of the parties to the subject dispute. See 3 AAC 48.090(d) and 3 AAC 48.166. It appears reasonable to me to use the same standard to initiate or terminate the investigation-hearing process.

<sup>3</sup> Concurring statement to LO# L0900456 dated August 21, 2009.

replacement. That replacement contract would have to meet the statutory requirement for contracts affecting rates to be just, reasonable, and neither unduly discriminatory nor preferential.<sup>4</sup>

For essentially the same reasons I joined in the conclusion that it was in the public interest to approve the Chugach-ConocoPhillips agreement without investigation, I believe that approval without investigation of this agreement is as well. As noted above the Attorney General, mandated by the legislature (since July 2003) to participate in matters before us when doing so is in the public interest,<sup>5</sup> did not ask us to investigate or disapprove the gas sales agreement. Nor did any of the entities with substantial economic interests in our regulation of utility gas supply agreements, and the resources to participate in that process, comment in favor of investigation or disapproval.

Chugach has also detailed its extended and extensive efforts to obtain gas supplies that will be needed, less than one year from now, to continue providing services to its consumers. Those efforts resulted in this agreement and no alternative gas suppliers. I have no reason to doubt, and no commenter has seriously challenged,<sup>6</sup> Chugach's efforts to obtain a reasonable contract for its members and consumers or the asserted absence of alternative suppliers. As the price of natural gas has lately tended to fluctuate dramatically, Chugach's use of futures contracts calculated on a yearly basis for pricing of gas in this agreement with Marathon balances its use of historical data calculated quarterly for gas pricing in its ConocoPhillips agreement. I believe that Chugach's decision to do so will likely help spread its price risks as intended and perhaps level its rates somewhat as well.<sup>7</sup>

For these reasons, and based upon review of this contract (and supporting documentation) for gas without which Chugach will be unable to provide service to its members and consumers in less than one year,<sup>8</sup> I believe it is in the public interest to approve this purchase agreement without investigation.

Because I appreciate the Attorney General's efforts in preparing and submitting comments, and in light of my previous statements that I envision following the Attorney General's recommendations on suspension and investigation in most instances, I wish to address some comments with which I disagree though they are not part of our present decision-making process. Initially, I disagree with the statement that the limited Cook Inlet natural gas market "had little

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<sup>4</sup> AS 42.05.431(a) provides, "When the commission, after an investigation and hearing, finds that a rate demanded . . . by a public utility for a service subject to the jurisdiction of the commission, or that a . . . contract affecting the rate, is unjust, unreasonable, unduly discriminatory or preferential, the commission shall determine a just and reasonable rate . . . or contract to be observed or allowed and shall establish it by order." (Emphasis added.)

<sup>5</sup> "The attorney general shall participate as a party in a matter that comes before the Regulatory Commission of Alaska when the attorney general determines that the participation is in the public interest." AS 44.23.020(e)

<sup>6</sup> Unlike the Attorney General, I do not believe that the elected Board of Directors of a member-owned cooperative is likely to be indifferent to contract pricing provisions for one of the major costs of providing electric service to its members and other consumers. *Comments of the Attorney General* at 5.

<sup>7</sup> Chugach's use of different pricing mechanisms is consistent with the legislature's recognition of the benefits of doing so and its recent proscription (effective May 13, 2010) that we do so as well. See AS 42.05.141(d)(1).

<sup>8</sup> AS 42.05.141(d)(2) further proscribes that, when we consider whether approval of a gas supply contract is in the public interest, we assess whether the utility could meet its public responsibilities if the contract is disapproved.

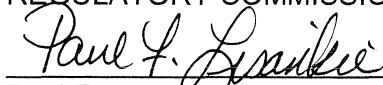
impact on ratepayers" when supplies were abundant.<sup>9</sup> In fact I believe it was the limited nature of the market that resulted in the ratepayers paying lower rates for decades as their utilities purchased their relatively small portions from that abundant supply. In any event I would assert that, if it were indeed our role to determine a reasonable price that ensures producer investment leading to long-term, reliable supply, that role would have been just as important years ago as supplies diminished. In other words, if you accept the proposition that we should regulate purchase prices (presumably lower) when supplies tighten then we should have regulated purchase prices higher to avoid that tightening.

However, I do not agree with that proposition or the comments concerning the importance of gas producer cost information to our decision-making process. The Attorney General notes that the gas producers are not regulated. I believe that if our consideration of a utility's gas purchase approval involved the determination of a reasonable price ensuring supply investment, based upon analysis of producer cost data, we would effectively be regulating producers by determining a "reasonable purchase/reasonable sale" price.

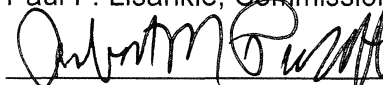
I do not believe my thinking in that regard is unique. My examination of federal regulation of gas pipelines, following the federal deregulation of natural gas production, revealed that Congress too was concerned that regulating pipeline purchase prices could become back door regulation of production. To avoid that result, Congress mandated that the pipelines' costs resulting from the producers' sale of gas to them would be approved by the Federal Energy Regulatory Commission and passed through to customers unless determined to be excessive due to "fraud, abuse, or similar grounds." As the court explained in *Office of Consumers' Counsel, State of Ohio v. Federal Energy Regulatory Commission*,<sup>10</sup> "The [Natural Gas Policy Act of 1978] requires the Commission to accommodate two competing policies in evaluating allegedly abusive pipeline conduct. Both the statutory mandate to deregulate producer prices and the available legislative history reflect congressional concern with "back door" regulation of producers. The fear was that if it were easy for FERC to deny pass through of the prices pipelines paid producers, this would provide an avenue for the Commission to regulate indirectly the prices producers charged."<sup>11</sup>

Since the Alaska Legislature has never instructed us to regulate the gas producers' prices, there was no need for us to be instructed to limit our scrutiny to excessive costs due to fraud or abuse. However, I think that in so instructing the FERC Congress has articulated the type of limited scrutiny consistent with avoiding unauthorized producer regulation. Consequently, I see that language as more support for the sort of scrutiny we have lately been giving utility gas purchase agreements submitted for our approval.

Sincerely,  
REGULATORY COMMISSION OF ALASKA



Paul F. Lisankie, Commissioner



Robert M. Pickett, Chairman

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<sup>9</sup> AG Comments at 4.

<sup>10</sup> *Office of Consumers' Counsel, State of Ohio v. Federal Energy Regulatory Commission*, 783 F.2d 206, (U.S.App.D.C. 1986)

<sup>11</sup> *Id.* at 221.