

MEMORANDUM TO: Honorable Mark Neuman, Chairman, House Finance Committee

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SUBJECT: Testimony Concerning AGDC Confidentiality Agreements

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Mr. Chairman:

Introduction. One can be confident that all citizens watching the House Finance Committee proceedings yesterday, and earlier, share a high opinion of the committee's diligence. Member homework and the quality of Member questioning reflected honor on the Legislative process and their own abilities. For the record, I will state that my opinion of the other body's Finance Committee proceedings is equally high.

To buy-out TC or not. To pass some version of TC buy-out legislation is a monumental decision. Some of us believe that while there may be financial benefits accompanying a buyout by December 4, the Administration and its Black & Veatch study overstate those benefits by presenting a "best case" based on the "Assumptions" employed by the study. I would follow that evaluation with a view that, as some of your Members have observed, the state government's ability to be an effective working partner in one of history's largest and most complex construction projects is not at all certain.

Buy-out not "if" or "when" but "how". Nevertheless, it seems a *fait accompli* has overtaken the Administration, Legislature, Citizens and Ak-LNG producers, namely: that the government will become an LNG project 'partner', fully aligned with the private entities, by early December. So it's not a matter of "if" or even "when", but "how do we deal with some of the irritating problems associated with state ownership before the deed is done?"

Forgetting the large mass of problems awaiting government equity, LNG project participation, let us now focus on the issue of Confidentiality Agreements (CA). CAs are not likely the biggest obstacle in the way of a partially government owned LNG project. However, the issue may be symbolic. CAs may be symbolic of how public vs. private entities view certain issues critical to project success. For example, if the government representative cannot have a "seat at the table" because his bureaucratic minders will only permit him to sign a CA of their design, not one tailored to the needs of the entire partnership, it could be a tragic way in which a multi-billion dollar investment is stalled or lost. One such way a restrictive CA could harm the project is that the government representative is forced to say to the industry "partners", "Well, you would not accept my CA template and would not permit me to participate in the meeting. Accordingly, I cannot give a favorable vote on this expenditure because I do not see how it is either justified or in the best interest of the State of Alaska." Can you not envision that a negative vote from the state on an expenditure requiring consensus could delay and possibly cause a reasonably priced item – like a pipe rolling mill contract award – to cost significantly more when the current opportunity passed unacted upon?

AGDC Management Opinion. I've been impressed over the last few days with AGDC management answering questions in ways that had the ring of truth to them, but in ways that could have caused the state Administration to be upset. For example, when Representative Saddler asked if the current draft CA regulations would speed up or delay project progress, management answered that it would slow the project. Indeed, we know AGDC management responded candidly because there is no way a government produced CA template opposed, as this one is, by Ak-LNG's private participants could have a positive effect on "alignment of interests".

Alignment. The state, TransCanada and the producer participants frequently speak of the importance of "alignment of the parties." How can there be alignment of the parties if one of the parties is bound by a rule prepared by state attorneys designed, not to promote efficiency of the project, but to promote political transparency in a process which is by its very nature required to be opaque? In short, if Alaska is to be an aligned party to one of the world's greatest construction projects, it must be able to execute the same CAs executed by the private partners—otherwise, they are unaligned. The question one would then have is, "if alignment in matters of confidentiality cannot be assured, can there be a successful project?" To that question, one should logically answer *a qualified, "yes"*. Without confidentiality alignment, the AK-LNG project could be successful *if* the unaligned state representative would stay out of meetings to which his state CA template did not admit him, and simply vote "yes" on confidential matters in consensus with his more knowledgeable, private industry, non-aligned "partners".

Another serious problem. Here is another serious challenge: UNCERTAINTY. If AGDC promulgates the CA regulation before December 4, at least everyone can know the state's position on the CA template before the TC buy-out deed is done. However:

- What if the private "partners" still find the CA template objectionable after the AGDC board approves it? In that case, the state will have already had the Legislature's approval and mandate to pay TC and take its place in the project, along with expanded equity risk participation. The unaligned partners will be stuck with each other and with an unacceptable, unresolved CA relationship.
- What if AGDC does not conclude its CA rulemaking before December 4, as indeed seems likely? In that case, the State will purchase the TC interest in Ak-LNG and not know until sometime later whether the Administration will "allow" its attorney and the board members over which it could exercise influence to approve the regulations -- along with unknown amendments that may memorialize lack of alignment and project disputes.

Recommendation. Based on the foregoing, the Legislature could consider providing AGDC the following:

- Statutory authority to create its own CAs required to timely and properly progress the Ak-LNG project subject only to approval of its board of directors (i.e. with the further provision that individual board member votes will be recorded for the record; and, that if the record is discussed in executive session that a confidential, individual vote record be maintained), and
- Some sort of either statutory protection or a statement of legislative intent that clearly cushions AGDC against the application of political influence by either the Administration or the Legislature (i.e. exception: potential board members may, of course, be fully interviewed and

vetted and questioned by a governor prior to appointment and by a legislature prior to confirmation).

- Authorization that the AGDC board may hire employee attorneys, contract attorneys or the state's Assistant Attorneys General of their choice and that having retained such counsel, the Attorney General may not give direction to AGDC but may provide advice to the board and management.

Conclusion. I offer this testimony, having been in previous careers before retirement: a federal and state industry lobbyist; a municipal official dealing with bond indentures; a regulatory utility commissioner, a university executive and an owner of small businesses.

In closing, a related but broader issue should be considered.

If a curtain of separation is not placed between AGDC and elected officials, the temptations of political influence will grow as the project grows. The issue of confidentiality agreement protocol we discuss today, came about because the Administration may desire to impregnate an inherently confidential process with some incompatible requirement of political "transparency". But just think of the other opportunities for public officials to want AGDC management to do something that pleases their politics, families, coworkers or contributors!

Anyone monitoring the hearings of the past week has to know the state seeks to be a fully aligned, ethical partner in this complex, historical project. But citizen observers will also mostly know that AGDC must be free – under the guidance of its public interest board – to say "yea" or "nay" on all matters with impartiality, wisdom and a just view of the myriad issues that could be involved. The board, management and staff should also be free to act, unfettered by the further complication of wondering whether the governor, the son of a legislator or a special interest group advocacy might be offended.

Ak-LNG is a business and if you want the state to be a part of it, it will have to act like a business or its participation, over time, is sure to corrupt the most highly anticipated project of this generation.