IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CITY OF VALDEZ, Appellant, v. REGULATORY COMMISSION OF ALASKA, Appellee.	)	Case Nos. 3AN-20-05915 CI 3AN-21-04104 CI Consolidated

RCA Docket P-19-017, Orders 6 and 17

***AMICUS CURIAE* BRIEF OF**
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By: _____
(Deputy) Clerk of Court

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PROVISIONS PRINCIPALLY RELIED UPON

AS 42.06.445. Public Records

(a) Except as provided in (b) and (c) of this section, or prohibited from disclosure under state or federal law, records in the possession of the commission are open to public inspection at reasonable times.

(b) The commission may, by regulation, classify records submitted to it by regulated pipeline carriers or pipelines as privileged records that are not open to the public for inspection. However, if a record involves an application or tariff filing pending before the commission, the commission may release the record for the purpose of preparing for or making a presentation to the commission in the proceeding if the record or information derived from the record is considered by the commission to be relevant to an issue in the proceeding, and if the record or information will be used by the commission in the proceeding. A record or information that the commission releases under this subsection may be released only after giving to the party that filed the record or information reasonable notice of its intention to release the record or information and opportunity to object to that release.

(c) A document filed with the commission that relates to the finances or operations of a pipeline subject to federal jurisdiction and that is in addition to or other than the copy of a document required to be filed with the appropriate federal agency is open to inspection only by an appropriate officer or official of the state for relevant purposes of the state.

(d) A person may make written objection to the public disclosure of information contained in a record filed under the provisions of this chapter or of information obtained by the commission or by the attorney general under the provisions of this chapter, stating the grounds for the objection. When an objection is made, the commission shall order the information withheld from public disclosure if the information adversely affects the interest of the person making written objection and disclosure is not required in the interest of the public.

(e) A commissioner may certify as to all official records of the commission under this section and may certify as to all official acts of the commission under this chapter.

(f) In this section, "record" means a report, file, book, account, paper, or application, and the facts and information contained in it.

AS 40.25.110. Public records open to inspection and copying; fees

In pertinent part, as the remainder only deals with the specifics of fees:

" (a) Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of the fee established under this section or AS 40.25.115 a certified copy of the public record."

Alaska Const. art. 8

§ 1. Statement of Policy
It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

§ 2. General Authority
The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

§ 3. Common Use
Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

§ 4. Sustained Yield
Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

§ 5. Facilities and Improvements
The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of the fisheries, wildlife, and waters.

§ 6. State Public Domain
Lands and interests therein, including submerged and tidal lands, possessed or acquired by the State, and not used or intended exclusively for governmental purposes, constitute the state public domain. The legislature shall provide for the selection of lands granted to the State by the United States, and for the administration of the state public domain.

§ 7. Special Purpose Sites
The legislature may provide for the acquisition of sites, objects, and areas of natural beauty or of historic, cultural, recreational, or scientific value. It may reserve them from the public domain and provide for their administration and preservation for the use, enjoyment, and welfare of the people.

§ 8. Leases
The legislature may provide for the leasing of, and the issuance of permits for exploration of, any part of the public domain or interest therein, subject to reasonable concurrent uses. Leases and permits shall provide, among other conditions, for payment by the party at fault for damage or injury arising from noncompliance with terms governing concurrent use, and for forfeiture in the event of breach of conditions.

§ 9. Sales and Grants
Subject to the provisions of this section, the legislature may provide for the sale or grant of state lands, or interests therein, and establish sales procedures. All sales or grants shall contain such reservations to the State of all resources as may be required by Congress or the State and shall provide for access to these resources. Reservation of access shall not unnecessarily impair the owners' use, prevent the control of trespass, or preclude compensation for damages.

§ 10. Public Notice
No disposals or leases of state lands, or interests therein, shall be made without prior public notice and other safeguards of the public interest as may be prescribed by law.

§ 11. Mineral Rights
Discovery and appropriation shall be the basis for establishing a right in those minerals reserved to the State which, upon the date of ratification of this constitution by the people of Alaska, were subject to location under the federal mining laws. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to these minerals and also a prior right to permits, leases, and transferable licenses for their extraction. Continuation of these rights shall depend upon the performance of annual labor, or the payment of fees, rents, or royalties, or upon other requirements as may be prescribed by law. Surface uses of land by a mineral claimant shall be limited to those necessary for the extraction or basic processing of the mineral deposits, or for both. Discovery and appropriation shall initiate a right, subject to further requirements of law, to patent of mineral lands if authorized by the State and not prohibited by Congress. The provisions of this section shall apply to all other minerals reserved to the State which by law are declared subject to appropriation.

§ 12. Mineral Leases and Permits
The legislature shall provide for the issuance, types and terms of leases for coal, oil, gas, oil shale, sodium, phosphate, potash, sulfur, pumice, and other minerals as may be

prescribed by law. Leases and permits giving the exclusive right of exploration for these minerals for specific periods and areas, subject to reasonable concurrent exploration as to different classes of minerals, may be authorized by law. Like leases and permits giving the exclusive right of prospecting by geophysical, geochemical, and similar methods for all minerals may also be authorized by law.

§ 13. Water Rights
All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

§ 14. Access to Navigable Waters
Free access to the navigable or public waters of the State, as defined by the legislature, shall not be denied any citizen of the United States or resident of the State, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

§ 15. No Exclusive Right of Fishery
No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.

§ 16. Protection of Rights
No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law.

§ 17. Uniform Application
Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.

§ 18. Private Ways of Necessity
Proceedings in eminent domain may be undertaken for private ways of necessity to permit essential access for extraction or utilization of resources. Just compensation shall be made for property taken or for resultant damages to other property rights.

I. JURISDICTIONAL STATEMENT

The Superior Court for the State of Alaska has jurisdiction over appeals from the final orders of the Regulatory Commission of Alaska (RCA) related to the Alaska Pipeline Act as per AS 42.06.480, which states "[a]ll final orders of the commission are subject to judicial review in accordance with AS 44.62.560-44.62.570." Provision of the Alaska Administrative Procedure Act AS 44.62.560(a) provides that "[j]udicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters." This Court also has the legal authority to consider this appeal pursuant to AS 22.10.020(d) and Rule 601(b) of the Alaska Rules of Appellate Procedure.

II. PARTIES TO THE CASE & INTEREST OF AMICUS CURIAE

Appellant: City of Valdez (Valdez).

Appellees: Regulatory Commission of Alaska (RCA or Commission), Hilcorp Alaska, LLC (Hilcorp), Harvest Alaska, LLC (Harvest), Harvest Midstream I, L.P. (Harvest Midstream), Hilcorp Energy I, L.P. (HEI), Hilcorp Energy Company (HEC), BP Pipelines (Alaska) Inc. (BPPA), and BP Corporation North America Inc. (BPCNA).

Amicus Curiae: Alaska Public Interest Research Group (AKPIRG).

The Alaska Public Interest Research Group (AKPIRG) is a 501(c)3 nonprofit and the only statewide non-governmental consumer advocacy and research organization in Alaska. We are nonpartisan and focus on consumer advocacy and good governance issues. Through our advocacy, we serve and reach an estimated 20,000 Alaskans. AKPIRG has

taken a leading role in protecting the public interest on numerous TAPS issues since 1974, when both AKPIRG and TAPS came into existence.

III. STATEMENT OF ISSUES

A. Did the Court overlook or misconceive material facts when determining that the City of Valdez lacked standing on RCA Order 17 for this appeal, though it held Valdez had standing to Appeal Order 6?

B. Did the Court overlook, misapply, or fail to consider directly controlling legal authority by not addressing whether exhaustion of administrative remedies was excused when all defects could have been cured through RCA discretion as has been done routinely in the past and this very case?

B. Did the Court overlook, misapply, or fail to consider directly controlling legal authority by not addressing the Public Interest Exception to mootness?

IV. STATEMENT OF THE CASE

Given AKPRIG's brief is a companion to the City of Valdez's Motion, *amicus curiae* AKPIRG hereby adopts the Summary of Argument (Section I) of the Motion for Reconsideration of Appellant, City of Valdez, as if fully set forth and supplemented herein.

In RCA Docket P-19-017, BPPA and Harvest (collectively, Applicants), sought approval of the transfer from BPPA to Harvest of BPPA's entire stake of its Alaska assets in the Trans-Alaska Pipeline System (TAPS) and the Valdez Marine Terminal (VMT), including Certificate of Public Convenience and Necessity (CPCN) No. 311 and,

accordingly, all operating authority.[1] In order to approve the Application for Transfer, the RCA was required to find that the Application for Transfer is in the public interest and that Harvest is fit, willing, and able to undertake the duties and responsibilities under the CPCN.[2] This required finding inevitably includes a demonstration that Harvest has the substantial financial wherewithal to fulfill its duties and obligations under the CPCN, the ability to operate and maintain the VMT and TAPS safely, and would not cut corners in the name of cost savings when the time came (2044 by current estimates)[3] for potentially billions of dollars to dismantle TAPS and restore the land to its natural condition.

Simultaneous with its Joint Application for Approval, Harvest, Hilcorp Alaska, and Harvest Midstream filed for the confidential treatment of basic financial statements and information provided to the RCA in support of the Application for Transfer pursuant to the balancing test contained in AS 42.06.445(d) and 3 AAC 48.045.[4] AS 42.06.445(d) states in pertinent part "When an objection [to public disclosure of information] is made, the commission shall order the information withheld from public disclosure if the information adversely affects the interest of the person making written objection and

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[1] Joint Application for Approval of Transfer of Certificate of Public Convenience and Necessity No. 311 and Operating Authority Thereunder from BP Pipelines (Alaska) Inc. to Harvest Alaska, LLC, filed September 27, 2019, in RCA Docket P-19-017 (Joint Application for Approval of Transfer).

[2] AS 42.06.305(b); AS 42.06.270(a).

[3] Joint Application for Approval of Transfer, 13.

[4] Harvest Alaska, LLC, Hilcorp Alaska, LLC, and Harvest Midstream I, LP's Petition for Confidential Treatment of Financial Statements, filed September 27, 2019, in Docket P-19-017.

disclosure is not required in the interest of the public." (emphasis added). 3 AAC 48.045 requires a showing that "the need for confidentiality **outweighs the public interest in disclosure**" (emphasis added). Unironically, the contours of the Alaskan public's interest in disclosure are sharpened by admissions within the petition itself about the reality of just how economically unregulated Hilcorp and its Harvest affiliates are and their out-of-touch concerns about competitive disadvantages to its Lower 48 business:

> "**In the Lower 48**, Harvest Midstream owns, through subsidiaries, many unregulated oil and gas pipelines and the pipeline business there is highly competitive. The pipeline business generally is not uniformly regulated either in Alaska or the Lower 48 where Harvest Midstream supports and participates in operations, transactions, and acquisitions. Making Harvest Midstream's financial information public will damage its ability to be competitive in its unregulated businesses and would potentially be anti-competitive.
>
> The estimated percentage of Harvest Midstream's overall work which is not economically regulated and therefore subject to competition is currently approximately 88%. Even after its acquisition of Harvest Alaska, the percentage of Harvest Midstream's business which would not be economically regulated will be approximately 62%. **It is with respect to this large amount of its business that is non-regulated that it is at the most risk of having competitors have access to its financial information**." (emphasis added).[5]

Nowhere in this initial request for confidential treatment was confidentiality asserted or requested under AS 42.06.445(c), nor did any of the documents that were sought to be maintained as confidential have a legend that asserted confidentiality under

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[5] *Id.* at 7-8.

AS 42.06.445(c). It was only until the RCA suggested *sua sponte* in RCA's Order 5 did AS 42.06.445(c) appear in play and only because the RCA did not believe that a strong case had been made for confidential treatment of the financial statements submitted while underscoring the overwhelming public comment expressing an interest in public disclosure.[6] Yet, in granting confidential treatment pursuant AS 42.06.445(c) in the subsequent Order 6, the RCA contorted itself in favor of nondisclosure and ignored its own precedent such that one of its own Commissioners went so far as to file a dissenting statement to Order 6.[7] In an early TAPS case on dealing with public disclosure of financial information, the RCA unambiguously held that"[t]he only requirement for classifying pipeline carrier information confidential under AS 42.06.445(c) is that it be filed with a legend stating 'Confidential Pursuant to AS 42.06.445(c).'"[8] The RCA has further ruled that, "[i]f a pipeline carrier does not affix this legend, the protections of AS 42.06.445(c) are deemed waived."[9] After Order 6, all confidentiality rulings by the RCA in Orders P-19-017(11),[10] 13,[11] 14[12] and 15,[13] used the foundational and contorted interpretation of

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[6] Order P-19-017(5), Feb. 11, 2020 (Order 5) at 9.

[7] Order P-19-017(6), Mar. 12, 2020 (Order 6); Dissenting Statement of Commissioner McAlpine to Order 6, Mar. 12, 2020.

[8] Order P-97-004(76), Apr. 7, 2000 (Order 76) at 13.

[9] *Id.*

[10] Order P-19-017(11), July 2, 2020 (Order 11).

[11] Order P-19-017(13), Aug. 6, 2020 (Order 13).

[12] Order P-19-017(14), Aug. 27, 2020 (Order 14).

[13] Order P-19-017(15), Sept. 4, 2020 (Order 15), allowing applicants to file documents in response to Order 15 as confidential under AS 42.06.445(c) without a petition for confidentiality ("If a security document qualifies for confidential treatment by us, it may

AS 42.06.445(c).[14] Plainly, these subsequent orders and, ultimately, RCA's Order 17 approving the transfer critically hinged on Order 6.[15]

To the extent there is disagreement about the interpretation of Alaska Statute 42.06.445, the Alaska Supreme Court has ruled the statute must be read in the context of the overall statutory scheme.[16] To fully understand the statutory scheme and purpose, it is essential to understand the historical context of its inception. In 1972, as the young State grappled with regulating the most expensive private capital project in history, the most important historical context for legislators was Alaska's effective status as a resource colony and a ward of the federal government. Equally important, though, was the State's intention to oversee Alaskan development whenever possible going forward.

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be filed with the legend "Confidential Pursuant to AS 42.06.445(c)" without an accompanying petition for confidential treatment.") (Order 15 at 2).

[14] Order 11 at 8 ("Consequently, the rationale we provided in Order No. 6 when recognizing that the financial statements of the applicants are confidential as a matter of law under AS 42.06.445(c) is equally applicable to the documents identified in the May 4 Petition."); Order 13 at 7-8 ("Consistent with our decision in Order 11, we find the FAAs identified in the July 7 Petition, like the FAA submitted May 4, 2020, are confidential as a matter of law under AS 42.06.445(c), the statute that precludes us from disclosing to the general public documents related to the finances or operations of a pipeline carrier subject to federal jurisdiction if the document is not required to be filed with the appropriate federal agency."; Order 14 at 5-6 ("We have previously afforded the companies' financial statements confidential treatment under AS 42.06.445(c), finding that the financial statements related to the finances and operations of pipelines subject to federal jurisdiction and are not required to be filed with the appropriate federal agency [citing to Order 6].

[15] Order P-19-017(17), Dec. 17, 2020 (Order 17).

[16] *City of Valdez v. State*, 372 P.3d 240, 249-51 (Alaska 2016) ("[I]t is first necessary to independently interpret AS 43.56 using our three metrics for statutory interpretation: text, legislative history, and purpose.").

From the opening of Alaska's first major gold mines in the 1880s to statehood in 1959, Alaskan land and resources were bought and sold for the benefit of outside capital. Gold, furs, salmon, and copper were extracted from the state, enriching outside corporations but returning little long-term value to Alaskan residents. This pernicious dynamic came to be called the "Kennecott Syndrome," in reference to the Kennecott Copper Mine that exported over $200 million worth of Alaska Copper, providing millions of dollars in profits to outside investors, but little revenue for the Territory of Alaska.[17]

In their quest for statehood, Alaskan political leaders also sought to guard against what they termed "federal neglect." Since the days of Territorial Alaska, Alaskans had an antagonistic relationship with federal regulation and at all times sought to retain local power over the development of Alaska's resources.[18] The most egregious example of "federal neglect" was Washington D.C.'s unwillingness to properly regulate fish traps—ruthlessly efficient machines which captured nearly all fish swimming upriver. The

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[17]Terrance Cole, *Blinded by Riches: The Permanent Funding Problem and the Prudhoe Bay Effect*, University of Alaska Institute of Social and Economic Research Understanding Alaska Series (Jan. 2004), https://iseralaska.org/static/legacy_publication_links/blindedbyriches.pdf. (The "Kennecott Syndrome" became short-hand for the kinds of resource development that extracted Alaska's natural wealth but contributed little to the state.)

[18] *See* Thomas Alton, *Alaska in the Progressive Age: A Political History*, *1896-1916* (Fairbanks AK: University of Alaska Press, 2019). (The origins of this disposition stems from the early 20th Century, when the Progressive-Era Federal Government initiated several large-scale land and mineral withdrawals, namely lands in the present day Tongass National Forest in 1902 and 1907, as well as the suspension of coal leasing in 1906. This prompted anti-federal demonstrates such as the "Cordova Coal Party" in 1911.)

effect was decades of destruction to Alaska's salmon population.[19] As such, Alaska's political leaders endeavored to ensure the State had authority to regulate its affairs to the extent it was not preempted by federal regulation.

The architects of Alaskan statehood explicitly sought to prevent the Kennecott Syndrome and redress failures of federal oversight.[20] The "Natural Resources" article of the Alaskan Constitution—a unique provision not found in other state constitutions—required natural resources to be developed in the public trust with maximum benefit for Alaskan citizens.[21] Constitutional framers also enshrined transparency and public accountability in various forms throughout Alaska's Constitution to protect the Alaskan public interest.[22] This "Natural Resources" article, as well as the vote by Alaskans in

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[19] Cole, *supra* n.16. *See also* Terrance Cole, *Ernest Walter Sawyer and Alaska: The Dilemma of Northern Economic Development, Pacific Northwest Quarterly*, Vol 82, No 2., pp 42-50. (Apr. 1991).

[20] Cole, *supra* n. 16 at 76. (In a November 1955 keynote address to the Alaska Constitution Convention, Congressional Delegate Bob Bartlett warned Alaska's founders that "If the public domain of Alaska is frittered away without adequate safeguards, the State of Alaska will wend a precarious way along the road that leads eventually to financial insolvency.")

[21] Alaska Const. art 8. *See also* Victor Fischer, *Alaska's Constitutional Convention* (Fairbanks AK: University of Alaska Press, 1975).

[22] Alaska Const. art 8; Alaska Const. art. 1 § 7; U.S. Const. Amend. XIV, § 1; Alaska Const. art 1, § 5; ; U.S. Const. Amend. I; *Sullivan v. Resisting Environmental Destruction on Indigenous Lands (REDOIL),* 311 P.3d 625, 634-637 (Alaska 2013) (holding that the State has a constitutional duty pursuant to Article VIII to maximize the use of public natural resources, as long as such use is in the "public interest."); *City of Fairbanks v. Alaska Pub. Utils. Comm'n*, 611 P.2d 493, 494 (Alaska 1980) ("Likewise, neither this court nor the superior court can evaluate the Commission's conclusion without the underlying information. These fundamental defects amount to a failure of due process." (citing *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292 (1937) ("Indeed, much that [regulatory commissions] do within the realm of administrative discretion is exempt from

1956 to ban fish traps, were direct responses to Alaska's economic history as a resource colony.

These dynamics were also front-of-mind when Alaskan legislators moved to regulate the intrastate movement of oil via pipeline following the discovery of Prudhoe Bay. The Trans-Alaska Pipeline System was constructed as the only market link to connect the largest oil field in North American history with consumers throughout the world. From when oil first moved through the pipeline in 1977 to the present day, TAPS has reigned as the most important pipeline system in the United States and the singular infrastructure for monetizing the Alaska's petroleum resources. Years before construction began, Alaskan political and intellectual leaders had already recognized the enormous stakes of this single economic artery and moved with purpose to ensure Alaskans would have ample transparency, participation, and control in regulating their most important infrastructure.

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supervision if those restraints have been obeyed. All the more insistent is the need when power has been bestowed so freely, that the "inexorable safeguard" of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of "the rudiments of fair play" assured to every litigant by the fourteenth amendment as a minimal requirement.")); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014) ("[A] access to public proceedings and records is an indispensable predicate to free expression about the workings of government. In the foundational case, the Court reasoned that "[f]ree speech carries with it some freedom to listen.") (internal citation omitted); *Alworth v. Seybert* 328 P.3d 47 (Alaska 2014) ("The Alaska Constitution protects free speech at least as broadly as the U.S. Constitution and in a more explicit and direct manner." (quoting *Alaskans for a Common Language, Inc. v. Kritz*,170 P.3d 183, 198 (Alaska 2007)).

The RCA's impermissible interpretation not only contradicts the intent of Alaskan legislators, it infringes the fundamental right of public access to government-maintained information and Alaskans' core constitutional rights enshrined in Article 8. Public access to government-maintained information is a fundamental right and cornerstone of democracy as it allows citizens to meaningfully participate in, and to monitor their government.[23] This is clearly demonstrated by Alaska law providing for public access to government information even before statehood and through to the present day, with more modern updates including legislative findings explicitly declaring "[p]ublic access to government information is a fundamental right that operates to check and balance the actions of elected and appointed officials and to maintain citizen control of government."[24] Thus, intrinsically, public access to government-maintained information is constitutionally protected. As discussed above as well, section 1 of the Natural Resources article of the Alaska Constitution also establishes that it is state policy to develop the state's resources by making them available to maximum use consistent with the public interest. Naturally, the "public" refers to all people of Alaska. The RCA's interpretation of AS 42.06.445(c) flouts this commitment, effectively permitting pipeline

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[23] *Gwich'in Steering Comm. v. State, Office of the Governor*, 10 P.3d 572, 578 (Alaska 2000) (citing *City of Kenai v. Kenai Peninsula Newspapers, Inc.,* 642 P.2d 1316, 1323–24 (Alaska 1982) (quoting *MacEwan v. Holm,* 226 Or. 27, 359 P.2d 413, 421–22 (1961) (en banc)).

[24] AS 40.25.110(a); Ch. 200, § 1, SLA 1990. ch. 200, § 1, SLA 1990 **("[P]ublic access to government information is a fundamental right that operates to check and balance the actions of elected and appointed officials and to maintain citizen control of government**.") (emphasis added).

owners to shield all, or at least a critical mass, of their documents from the Alaskan public. Such a decision is particularly alarming to AKPIRG, as it forecloses one of our organization's central missions—ensuring citizens have access, transparency, and participation in their democracy.

This reading is also especially troubling considering the incredible nature of the proposed transfer of the dominant ownership of the Trans-Alaska Pipeline System from BP to Hilcorp. Not only is this the most important Alaskan business deal in a generation, it directly pertains to how the state monetizes its petroleum resources and funds a significant portion of government services. Furthermore, Hilcorp has asked the state to accept a novel segmentation of CPCN responsibilities, with far reaching consequences that will affect Alaskans for decades to come. Specifically, the applicants are requesting the bifurcation of CPCN obligations so that Harvest and its affiliated companies would not be financially responsible for many of their CPCN obligations.

Ensuring Alaskan citizens access, transparency, and sovereignty in such a crucial pipeline transfer is precisely what AS 42.06 was designed to protect. And yet the opposite is happening under the RCA's ahistorical and strained reasoning. The financial information being withheld from the Alaskan public as confidential under the Commission's Order 6 is crucial to a determination as to whether Hilcorp affiliate Harvest is financially fit, willing, and able to assume the huge financial responsibilities associated the ownership of TAPS and the VMT. Alaskans are being expected to accept too much at face value, knowing full well that fundamental information is accessible and would typically be available if not for seemingly selective technicalities. The public has

no choice but to speculate as to whether and how exactly the fit, willing, and able standards are actually met.

Fundamentally, the present appeal concerns whether the Alaskan public can meaningfully participate in the most important pipeline transfer in the history of this State. While the public has had an opportunity to provide comment on the transfer applications at issue, to a large extent those comments only testified to the mortifying circumstances of public ignorance regarding fundamental facts—deeply odds with Alaskan history and values of self-determination and accountability. In truth, the public has not had the basic information necessary to even begin to evaluate, comment upon, meaningfully engage in, or protest the transfer of significant ownership interest in the Trans Alaska Pipeline System (TAPS), Valdez Marine Terminal (VMT), Alyeska Pipeline Service Company (operating company for TAPS), Prince William Sound Oil Spill Response Corporation, and pipelines at Point Thomson and Milne Point.

Despite hundreds of public comments demanding transparency and reasonable disclosures in the largest Alaskan business deal in a generation amidst a pivotal state fiscal crisis,[25] the RCA's decision allows Hilcorp and its Harvest affiliates to hide essential information and creates a dangerous precedent of bending over backwards in regulatory actions in favor of smaller, less experienced, and secretive companies out of economic desperation or business as usual. These public comments demonstrate a demand to be informed such that everyday Alaskans may retain some semblance of control over what is

[25] RCA P-19-015(17)/P-19-016(17)/P-19-017(17) at 16-17.

essentially the people's business.[26] As with the RCA, AKPIRG views this court as a venue to place in focus the serious concerns of our communities and work towards more effective oversight, greater transparency, and good governance.

Following the August 27, 2019 announcement that Hilcorp and its Harvest affiliates intended to buy BP's stake in TAPS and the VMT, AKPIRG has been intimately involved and outspoken in the transaction at all levels of government, including the legislature, RCA, Department of Natural Resources, and now in the courts. An initial lack of public involvement, relative silence by elected leaders, and refusal by state agencies to permit public comment precipitated AKPIRG to seek more effective oversight, greater transparency, and good governance in the deal. AKPIRG held two public hearings (one each in Anchorage and Fairbanks) on the issue, which were covered by local news and reached thousands of Alaskans via social media.[27] In conjunction with these public

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[26] Dissenting Statement of Commissioner McAlpine to Order 6, *supra* n. 7 ("I believe that airing these documents publicly and subjecting the entire transaction to intense debate far outweighs the petitioners' interest in keeping them confidential. Instead, Hillcorp has invited an unnecessary public relations nightmare over what may come of the lifeblood of our state. Now public scrutiny may well be based on speculation as to what the documents may or may not say rather than a complete airing of the facts as they exist."); *See also* Alaska Const. art. 8; Alaska Const. art. 1 § 7; U.S. Const. Amend. XIV, § 1; Alaska Const. art 1, § 5; U.S. Const. Amend. I; *Sullivan v. Resisting Environmental Destruction on Indigenous Lands (REDOIL),* 311 P.3d 625, 634-637 (Alaska 2013); *City of Fairbanks v. Alaska Pub. Utils. Comm'n*, 611 P.2d 493, 494 (Alaska 1980); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014); *Alworth v. Seybert* 328 P.3d 47 (Alaska 2014).

[27] Dan Bross, *KUAC Morning News*, 9:30am KUAC Morning Newscast, Oct. 24, 2019, https://fm.kuac.org/post/10-24-19-kuac-morning-news.

informational meetings, AKPIRG published numerous opinion-editorials informing Alaskans about the stakes of the proposed deal and encouraging public comment, especially on vital issues like transparency, liabilities, and a robust review by the RCA.[28] Following AKPIRG's elevation of the issues, average Alaskans, newspaper editorial boards, and prominent public leaders called for greater transparency and accountability in the deal.[29] Furthermore, AKPIRG commissioned Alaska Survey Research to conduct a professional poll, which revealed that 62% of Alaskans wanted Hilcorp to publicly disclose their finances as a condition of the sale.[30]

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[28] Philip Wight, *Where's the scrutiny on Hilcorp?,* Fairbanks News-Miner, Oct.19, 2019, https://www.newsminer.com/opinion/letters_to_editor/where-s-the-hilcorp-scrutiny/article_76bbdcba-f221-11e9-93e5-53b4ccc51125.html; Veri di Suvero, *Should we trust Hilcorp with the pipeline?*, Anchorage Daily News, Oct. 23, 2019, https://www.adn.com/opinions/letters/2019/10/24/letter-should-we-trust-hilcorp-with-the-pipeline/.

[29] Fairbanks News-Miner Editorial Board, *We Need More Hilcorp Info: The Sale Of BP's Alaska Assets Is A Matter Of Great Consequence*, Fairbanks News-Miner, Nov. 7, 2019; Dermot Cole, *Nobody's paying attention to Alaska's biggest deal in a generation*, Reporting from Alaska, Oct. 22, 2019. https://www.dermotcole.com/reportingfromalaska/2019/10/22/hilcorps-stealth-acquisition-of-bp-assets-draws-little-press-coverage; *See also* prominent Alaskans demanding accountability: former Governor Tony Knowles, *It's Time for Alaska to Get Public Commitments on the Hilcorp Sale*, Anchorage Daily News, Dec. 13, 2019, https://www.adn.com/opinions/2019/12/14/its-time-for-alaska-to-get-public-commitments-on-the-hilcorp-sale/; former Anchorage Mayor Jack Roderick*, Hilcorp responsibilities*, Anchorage Daily News, Nov. 20, 2019, https://www.adn.com/opinions/letters/2019/11/20/letter-hilcorp-responsibilities/; *Cf.* prominent Alaskans opposing AKPIRGs position: John Shively, *Charter agreement is unnecessary burden for Hilcorp purchase,* Alaska Journal of Commerce, Nov.14, 2019, https://www.alaskajournal.com/2019-11-14/guest-commentary-charter-agreement-unnecessary-burden-hilcorp-purchase.

[30] December Alaska Survey, Alaska Survey Research, Jan. 25, 2020.

AKPIRG has had early, sustained, and robust involvement with the RCA's process, and has been outspoken concerning the failures and flaws of the State's regulatory review. AKPIRG's involvement proved important in the RCA's decision to extend the public comment period multiple times (first until November 8, 2019, and then until December 13, 2019), and eventually offer an in-person hearing.[31] Throughout the RCA's process, AKPIRG submitted multiple comprehensive comments encouraging the RCA to open a full evidentiary hearing, permit the public access to essential documents, and to condition the deal in ways that would protect the public interest. AKPIRG's numerous comments indicated major issues with the proposed deal and outlined reasonable conditions the RCA should require of the transaction. One such AKPIRG comment to the RCA was considered comprehensive and representative enough that *Petroleum News* used it as an exemplar in their article on the ongoing issues of the BP-Hilcorp proceedings.[32]

Following a December 20, 2019 reply after the public comment period by BP, Hilcorp, and its Harvest affiliates seeking to minimize, exclude, and/or refute the concerns of Alaskan citizens, AKPIRG again offered a comprehensive reply. We felt compelled to answer the claim that "there is no public interest requiring disclosure which outweighs the privacy interests of the Petitioners." We argued that Hilcorp and its Harvest affiliates had "demonstrate[d] a consistent failure to acknowledge the unique public interests of

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[31] Amanda Bohman, *Comment period extended for trans-Alaska oil pipeline ownership transfer*, Fairbanks News-Miner, Oct. 25, 2019; Regulatory Commission of Alaska, Order 4, "Order Scheduling Public Input Hearing", January 28th, 2020.
[32] Kristen Nelson, *BP-Hilcorp Deal: Many Issues Remain*, *Petroleum News,* Apr. 26, 2020, https://www.petroleumnews.com/pntruncate/808530246.shtml.

Alaskans and that Alaskan interests may, at times, be more important than Hilcorp's desire to profit from the sale of Alaskan resources."[33]

AKPIRG's reply occurred outside of the formal RCA process, since the RCA did not open an evidentiary hearing, as is normal with such consequential proceedings.[34] The Commission offered a performative display of listening to the public, but did not conduct its regular, expected review by opening an evidentiary docket. The RCA does not grant petitions to intervene unless it first determines the case will be decided upon an evidentiary record after notice and hearing.[35] As such, neither AKPIRG nor the City of Valdez had the opportunity to become an intervener.

In its initial comments, AKPIRG urged the Commission to hold no less than two Public Input Hearings, one before the RCA ruled on the requests for waiver and petitions for confidential treatment, and one following their ruling to give further input on the deal so that the Commission can act in the public's interest after having heard from a more informed public. From the very inception of this proposed transfer, AKPIRG argued the public must be granted BP and Hilcorp's basic financial information to make informed decisions about the transfer of public natural resources.[36] Absent a reasonable level of

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[33] AKPIRG, *Response of the Alaska Public Interest Research Group*, RCA, Feb. 6, 2020.
[34] *See* City of Valdez's Motion for Reconsideration, Aug. 23, 2021.
[35] 3 AAC 48.110(a) ("Petitions for permission to intervene as a party will be considered only in those cases that are to be decided upon an evidentiary record after notice and hearing.").
[36] AKPIRG, *Public Comment*, RCA Dec. 13, 2019.

disclosure which permits the public to view Hilcorp's basic information, the RCA is unconstitutionally denying Alaskans the ability to be good stewards of public resources.

Despite not being a formal intervener, AKPIRG continued to engage with the RCA, state agencies, and the public on the BP-Hilcorp decision.[37] Following the downturn in oil and financial markets amid the novel COVID-19 pandemic in the Spring of 2020, AKPIRG submitted a reply requesting the RCA require new and updated financial statements from Hilcorp Energy, LLC, including its affiliates.[38] Likewise the City of Valdez, through its counsel, submitted an informational filing to the Commission regarding Moody Financials downgrading of Hilcorp's credit ratings.[39] Both AKPIRG and the City of Valdez have submitted numerous complaints to the RCA throughout this process, despite the failure to open an evidentiary hearing.

As the court recognized, BP and Hilcorp's "petition was controversial; the RCA received hundreds of public comments."[40] This underscores the enormity of public interest and engagement with this issue. To our knowledge, never before has there been a pipeline transfer in the State of Alaska that has attracted this much interest or controversy. The intense public interest and criticism is all the more noteworthy given the RCA's refusal to open a formal docket and the Court's present dismissal of the City of Valdez's attempts to

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[37] *See e.g., AKPIRG to Corri Feige*, Department of Natural Resources, June 4, 2020.
[38] AKPIRG, *Public Comment*, RCA, Apr. 3, 2020.
[39] City of Valdez, *City of Valdez's Informational Filing Regarding Moody's Recent Downgrading of Hilcorp's Ratings*, RCA, Sept.14, 2020.
[40] Order Granting Appellees' Motion to Dismiss (Dismissal Order), Aug. 10, 2021, 3.

seek relief concerning Order 6 and Order 17. Considering the enormous public interest stakes of TAPS and future pipeline ownership transfers, AKPIRG is alarmed at the RCA's secrecy and the Court's denial to address the substance of the case. Through the BP-Hilcorp deal, Alaskans have been systematically denied the ability the meaningfully engage in the deal and gain access to basic information that enables them to be good stewards of public resources. Without relief, individual Alaskan citizens and the public interest will suffer serious, enduring, and irreparable harm.

V. STANDARD OF REVIEW

The heart of this case revolves around rights under Alaska's constitution and the RCA's interpretation and application of an Alaska statute. However, at this relatively early stage, that has yet to be meaningfully examined and will not be should this Court decline to reconsider Order Granting Appellees' Motions to Dismiss, dated August 10, 20219 (Dismissal Order). Truthfully, AKPIRG's participation as *amicus curiae* is a plea that the Court recognizes the public interest import of the RCA's Order 6, context of the City of Valdez's (and, in turn, AKPIRG's) robust participation, and that every cementing step since then to the RCA's Order 17 approving the transfer hinged on Order 6. AKPIRG seeks to clarify the Court's understanding and shed light on any overlooked or misconceived material facts or misapplications of law to in order to avoid more sever impacts on public natural resources or irreversible consequences in the long term.

Alaska Rule of Civil Procedure 77(k) allows the superior court to reconsider a previous ruling if, among other reasons the Court "overlooked, misapplied, or failed to consider…a decision or principle directly controlling" or the Court overlooked or

misconceived a material question, some material fact, or proposition of law.[41] Rule 77(k) does not establish a standard for granting or denying motions for reconsideration, however, the Alaska Supreme Court has stated "the limited purpose of Rule 77(k) is to remedy mistakes in judicial decision-making where grounds exist, while recognizing the need for fair and efficient administration of justice."[42] Rule 77(k) allows the Court to reconsider a previous ruling if, among other reasons the Court "overlooked, misapplied, of failed to consider…a decision or principle directly controlling or the Court "overlooked or misconceived a material question, some material fact, or proposition of law." Ultimately, whether to grant or deny a motion for reconsideration lies within this Court's discretion.[43]

VI. ARGUMENT

Amicus curiae, AKPIRG hereby adopts the Argument (Sections II-VII of the Motion for Reconsideration of Appellant, City of Valdez, as if fully set forth and supplemented herein.

After decades of living in a resource colony for multinational companies and the federal government, Alaskans decided to create a state with an unprecedented commitment to local, public oversight. Our state's constitution enshrines that natural resources to be developed in the public trust with maximum benefit for Alaskan citizens. Moreover, public

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[41] Alaska R. Civ. P. 77(k).

[42] *Dobson v. Dobson,* No. S-17781, 2021 WL 1662768, at *2 (Alaska Apr. 28, 2021), reh'g *denied* (June 1, 2021).

[43] *Stephan P. v. Cecilia A.,* 464 P.3d 266, 272 (Alaska 2020).

access to government-maintained information is a fundamental right and cornerstone of democracy as it allows citizens to meaningfully participate in, and to monitor their government. Accordingly, public access to government-maintained information is constitutionally protected. AS 42.06.445 is a continuation of that commitment. As part of the 1972 Alaska Pipeline Act, the government of Alaska stepped in to provide open and comprehensive state regulation of its pipelines so that the public and legislators could be engaged with the stewardship of Alaska's resources. The RCA's reading of AS 42.06.445 gives it the opposite effect and created a foundation of closed circuit of approval for this transfer as all subsequent matters relevant to this Court's dismissal stemmed from the RCA's contorted interpretations of this statute. According to the RCA interpretation, the statute would prevent Alaskans from participating in the regulatory scheme that was enacted specifically to promote state participation. That reading is plainly unreasonable in light of the statute's historical context. From that interpretation and despite timely opposition, cascading technicalities have forestalled the public's ability evaluate this transfer and continuing compliance for themselves.

It becomes even more troubling considering the unprecedented nature of the transfer of the dominant ownership of TAPS and VMT from BP to Hilcorp and its Harvest affiliates. This is the most important and contentious transfer the Commission has overseen. Ensuring Alaskan citizens access, transparency, and sovereignty in such a crucial pipeline transfer is precisely what AS 42.06 was designed to protect. Prematurely dismissing the case at this stage of appeal only shuts the closed circuit of approval this

deal has been treated to evermore firmly. Therefore, the Order Granting Appellees' Motions to Dismiss should be reconsidered and reversed.

A. The Court overlooked or misconceived material facts when determining that the City of Valdez lacked standing on RCA Order 17 for this appeal, though it held Valdez had standing to Appeal Order 6, which also encompasses the fundamental flaws as to the Court's consideration of exhaustion of administrative remedies because all defects could have been cured through RCA discretion as has been done routinely in the past and this very case

In the Alaska Supreme Court case of *City of Kenai v. APUC, 736 P.2d 760 (Kenai)*, the *Kenai* Court examined the applicable three-element test to determine whether standing to appeal had been achieved by the City of Kenai: whether the City (1) was directly interested in the proceedings, (2) was factually aggrieved by the decision, and (3) participated in the proceedings.[44] The RCA has acknowledged the City of Valdez's participation was sufficient to meet the third element of the *Kenai* standing test.[45] Moreover, the RCA has also already conceded that the City of Valdez has standing to appeal Order 17. Pursuant *Kenai,* the RCA and the Hilcorp and its Harvest affiliates have submitted to this Court that:

> [E]ven if the City of Valdez never becomes a party in the administrative proceeding, that would not affect standing to ultimately appeal a final order. Rather, **participation in the form of substantive comments is sufficient for appellate party status**. In other words, the City of Valdez may raise all issues which may arise during these administrative proceedings in appeal of the final order.[46]

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[44] *Kenai* at 762-63.

[45] RCA Motion to Dismiss Consolidated Appeal, 3AN-20-05915CI & 3AN-21-04104 CI (May 14, 2021), at 2.

[46] RCA Motion to Dismiss Order 6 Appeal, 3AN-20-05915CI (Apr. 30, 2020), at 6; Hilcorp's Joinder in RCA's Motions to Dismiss Appeal and to Stay Transmittal of Agency Record, 3AN 20-05915CI (May 18, 2020) (emphasis added); *Kenai* at 762-63.

Perhaps most importantly, *Kenai* was not about the technicalities of participation or otherwise checking off boxes of appropriate hoops to jump through—standing in the case turned on stressing opposition and the RCA in that case used its discretion to incorporate earlier written comments.[47]

AKPIRG vehemently disagrees with the notion that the City of Valdez does not have standing in this case and that the issue of exhaustion of administrative remedies is fatal. Arguably no city in Alaska has been more impacted, and will be more impacted, by the operation of the Trans-Alaska Pipeline System, Valdez Marine Terminal, and TAPS tankers than Valdez. We find the idea that Valdez—a city in the shadow of the operation of the largest oil port facility in Alaska and on the U.S. West Coast, who has suffered from the *Exxon Valdez* oil spill and lived with one of the largest point sources of pollution in the State of Alaska (the Valdez Marine Terminal), who derives a majority of its tax revenue from the operations of TAPS, and who through its counsel has been intimately and frequently outspoken in the RCA's review of the BP-Hilcorp transaction—does not have standing to be perverse. It is hard to imagine a single stakeholder who has more standing or interest in this case. AKPIRG supports Valdez's

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[47] *Kenai* at 763 (The issues presented by Kenai in its opposition constituted the focus of the public hearing and of the Commission's order that followed. This is sufficient participation to achieve "party" status for the purpose of standing to appeal from an administrative adjudication.")

position as a public litigant who is fighting not only on behalf of vested City interests, but also on behalf of the interests of concerned Alaskans throughout the State.

As described in length above, the City of Valdez and AKPIRG participated in RCA Docket P-19-017 to a much greater extent, and with logical connection lodging opposition from Order 6 to Order 17, than acknowledged by this Court's dismissal order. Even Appellees Hilcorp and its Harvest affiliates concede the decision to hold such an evidentiary hearing "remains at the RCA's discretion."[48] Appellee RCA has elaborated further:

> "Pleadings seeking relief from the RCA are generally in the form of a motion, 3 AAC 48.091, although in some cases the pleading is described as a petition or complaint. 3 AAC 48.100. **In non-hearing dockets, non-parties may file certain pleadings without becoming parties,** 3 AAC 48.110(a), but non-parties are not excused from substantial compliance with the RCA's form of pleadings **regulations unless the commission affirmatively exercises discretion to liberally construe comments as pleadings**. 3 AAC 48.090(c). An example of this process is the RCA's consideration of City of Valdez's comments as an opposition to petitions for confidential treatment… Until a final order was issued, **all of the procedural defects discussed above could have been cured, mitigated or excused, either by affirmative action by City of Valdez, or discretionary actions by the RCA or others**. "[49] (emphasis added).

Both AKPIRG and the City of Valdez made it obvious to the RCA that they requested that a public evidentiary type hearing be set, not just a hearing for receipt of public input as was held only after increased public scrutiny. Without the RCA's

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[48] Hilcorp et al., Motion for Dismissal of Appeal, 3AN-20-05915CI & 3AN-21-04104 CI (May 14, 2021), at 2.

[49] RCA Motion to Dismiss Consolidated Appeal, at 3 fn.5.

initiation of an evidentiary hearing the City of Valdez and AKPIRG affirmatively participated to the fullest extent that was permitted by RCA procedures and precedent. Within this request was that interventions be permitted and the pending confidentiality petitions be denied. With its discretion, even the RCA characterized and construed the City of Valdez's filings as an opposition to the then pending petitions for confidential treatment. [50] Unfortunately, intervention as the Court conceives of it was not possible because the RCA never called for any public evidentiary hearing. Any fatality to the City of Valdez's standing or exhaustion of administrative remedies could have been cured, mitigated or excused by the discretionary actions by the RCA. The peril the City of Valdez faces is more than just the futility of exhaustion—it exemplifies the perplexing and distressing futility of exceptions to exhaustion in application.

B. The Court overlooked, misapplied, or failed to consider directly controlling legal authority by not addressing the Public Interest Exception to mootness

The criteria to be considered in determining whether to review a moot question:

> The public interest exception involves the consideration of three main factors: 1) whether the disputed issues are capable of repetition, 2) whether the mootness doctrine, if applied, may repeatedly circumvent review of the issue and, 3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine.[51]

Pursuant to this Public Interest Exception to mootness, AKPIRG contends this case is far from moot. The issues at stake here extend far beyond the BP-Hilcorp

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[50] Order 6 at 10.

[51] *Hayes v. Charney,* 693 P.2d 831, 834 (Alaska 1985) (citations omitted).

transaction and go to central questions about good governance, transparency, and citizen involvement in the extraction of public resources. The public has an enormous interest in the *ongoing* operation of TAPS, for fiscal and environmental reasons. This is a live and enduring controversy for three compelling reasons as per the Public Interest Exception above, particularly why issues presented are so important to the public interest so as to justify overriding the mootness doctrine.

First, The RCA's decisions in Order 6 and Order 17 threaten to permanently alter how the Commission reviews applications and what materials can be hidden from the public. These regressive precedents multiply the harm done with the legally dubious review of the BP-Hilcorp deal. The RCA did not open an evidentiary hearing. It did not permit the interested parties or the public to see the basic facts of the case. It decided that documents that have been public for the forty-year operational history of TAPS should now be secret. Based on this secret record, it permitted Hilcorp and its Harvest affiliates to acquire a dominant position in TAPS, conditioned on certain guarantees that the public cannot review. This is a regressive precedent that permits industry to exclude the public from future hearings and keep basic information secret. This will happen again and it will have the full endorsement of this precedent, both at the RCA and in the courts, to escape subsequent reviews—cementing this problematic approach for these types of transfers in the future.

The repercussions of the RCA's confidential designations and reading of AS 42.060.445(c) reverberate throughout Order 17 with the RCA itself acknowledging that "[o]ur evaluation of an application is usually based on publicly disclosed

information…[and] the fact that we must base the decisions on these applications in part on confidential information has complicated... [matters]."[52] At stake here is not just the BP-Hilcorp transaction, but how the RCA will adjudicate future transactions. BP will not be the last major oil company to sell its ownership stake in TAPS and the North Slope. What Alaskans witnessed with the BP-Hilcorp deal is likely to continue happening over the coming decades as the world transitions beyond oil and majors like Exxon and ConocoPhillips attempt to reimagine themselves as integrated energy companies.[53] Firms with even less assets than Hilcorp and its Harvest affiliates are likely to seek ownership stakes without the requisite expertise or capital. Alaskans must be vigilant and guarded as less resourced companies attempt to operate major assets.

Second, this is a live controversy because of the ongoing safety and environmental violations of Hilcorp, LLC. When the proposed BP-Hilcorp deal with announced in August, 2019, the historical record offered ample warnings for regulators concerning Hilcorp's record. According to the Pipeline and Hazardous Materials Safety Administration (PHMSA), Harvest, Alaska has the 20th worst performance record of 310 companies that operate less than 300 miles of pipelines. Harvest, Alaska's parent company, Harvest, LLC has the dubious distinction of having more accidents than nearly any other company operating more than 300 miles of pipeline. Furthermore, since it

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[52] Order 17 at 35.

[53] *ConocoPhillips Adopts Paris-Aligned Climate Risk Framework to Meet Net-Zero Operational Emissions Ambition by 2050*, ConocoPhillips.com, Oct. 19, 2020.

began operating in Alaska in 2012, Hilcorp has been responsible for over 90 crude oil discharges.

Among its three most egregious incidents was an accident in 2015 that nearly killed three workers, an aging and poorly-maintained Hilcorp underwater pipeline (the MGS Fuel Gas System) that ruptured in the Cook Inlet and leaked methane for months during the winter of 2017, and death of a worker on the North Slope in late 2018. The Alaska Oil and Gas Conservation Commission (AGOCC) concluded that, "The disregard for regulatory compliance is endemic to Hilcorp's approach to its Alaska operations…Hilcorp's conduct is inexcusable."[54]

In the midst of the transaction, on May 14, 2020, the AOGCC levied another fine against Hilcorp, this time for a failure to submit required information to the AOGCC. "Hilcorp's lack of good faith in its attempts to comply with the imposed conditions, its history of regulatory noncompliance and need to deter similar behavior are factors which most heavily influence AOGCC's decision and the penalty being assessed," the Commission argued. The Commission said that while Hilcorp's compliance had improved somewhat, "the recurrence of failing to account for approval conditions imposed by AOGCC calls into **question the effectiveness of corrective actions implemented in responses to past enforcement actions**."[55]

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[54]Hilcorp Alaska, LLC Docket No. OTH-15-025, AOGCC, Nov. 12, 2015, https://www.documentcloud.org/documents/3921678-2015-11-12-AOGCC-Notice-of-Proposed-Enforcement.html#document/p5/a367600

[55] Kristen Nelson, *AOGCC Confirms $30,000 Hilcorp Fine*, *Petroleum News*, May 24, 2020, https://www.petroleumnews.com/pntruncate/76698962.shtml (emphasis added).

Since the RCA ruled in Order 17 to conditionally permit the transfer of BP's assets to Hilcorp and its Harvest affiliates, the situation has continued to deteriorate. On April 1, 2021, Hilcorp determined that they had another gas leak from its MGS Fuel Gas System in the Cook Inlet.[56] This was the fifth leak from the same subsurface pipeline since 2014. Despite spotting the leak on Thursday at 4:30m, Hilcorp did not shut down the pipeline for nearly two days, until 1:30pm Saturday. The Cook Inlet is designated as an environmentally sensitive area due to the presence of several endangered marine mammals. Federal regulators with the Pipeline and Hazardous Materials Safety Administration (PHMSA) ordered Hilcorp to immediately shut down the sixty-year-old pipeline and eventually replace it.[57] Bob Shavelson of Cook Inlet Keeper argued the leak was expected; "This is not an accident," he said. "It's wholly foreseeable and part of Hilcorp's business model to buy aging assets and squeeze out any remaining profits."[58] As the City of Homer emphasized in its RCA comments, "An oil company's social license to operate in Alaska requires placing environmental, employee, contractor, and public safety above all else."

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[56] Sabine Poux, *Hilcorp Gas Pipeline Springs Another Leak in Cook Inlet*, *Alaska Public Media*, April 6, 2021, https://www.alaskapublic.org/2021/04/06/hilcorp-gas-pipeline-springs-another-leak/.

[57] Amended Corrective Order, Pipeline and Hazardous Materials Safety Administration, April 6, 2021.

[58] Alex DeMarban, *Hilcorp Shuts Down Two Offshore platforms in Cook Inlet After Natural Gas Leaks From Fuel Line*, Anchorage Daily News, Apr. 5, 2021, https://www.adn.com/business-economy/energy/2021/04/06/hilcorp-shuts-down-two-offshore-platforms-in-cook-inlet-after-natural-gas-leaks-from-fuel-line/.

Finally, this case remains live and active because, despite a mistaken idea that Order 17 has made this a "done deal," BP has not actually left Alaska. BP is not only still lending Hilcorp and its Harvest affiliates the money it needs to buy BP's Alaskan assets ("vendor financing"), but BP still has tremendous obligations to Alaskans—namely a variety of upstream and midstream Dismantling, Remediation, and Restoration (DR&R) obligations. BP has given up on expectations of making future profits from petroleum in the state, but it still owes Alaskans billions of dollars.

Since 1977, over $5 billion dollars have been collected by TAPS Owner Companies, chiefly BP, for the purposes of DR&R. These $5.164 funds are not required to be held in escrow or trust accounts. By relying on "corporate assurances", Alaskans are essentially trusting that TAPS owner companies will always have the capital to pay the billions of dollars required to dismantle TAPS and restore land to its natural condition. This is a major assumption with tremendous public interest implications, as the viability and accessibility of DR&R funds are essential for employing thousands of Alaskans and ensuring the health of the State's economy beyond North Slope oil.

The Texas Supreme Court recently ruled that Unocal was not responsible for retaining its DR&R obligations, despite its ownership of 1.3% of TAPS. The other TAPS owners in the case--BP Pipelines, ConocoPhillips Transportation Alaska Inc., and ExxonMobil Pipeline Co., argued "Unocal seeks to rid itself of a costly obligation, not just for free but at a profit, contending it can keep the increased tariffs it collected over the years to

pay for DR&R as it accrued." This case raises significant questions about current DR&R regulations and processes.[59]

In Order 17, The RCA describes the novel segmentation arrangement of DR&R responsibilities between BP and Hilcorp and its Harvest affiliates as "awkward and fraught with potential for disputes and litigation" but required no major changes to the arrangement. The long-term viability of DR&R responsibility remains reliant on public representations and mere promises. Only a single TAPS DR&R cost study from 15 years ago was publicly provided while all other DR&R assessments were deemed confidential.[60] Additionally, the accountability that is theoretically built-in with periodic reporting of financials and DR&R obligations/costs remains solely within the purview of regulatory entities without any avenue for public oversight in the future.

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[59] *Unocal Pipeline Co. v. BP Pipelines (Alaska) Inc.,* 512 S.W.3d 492, 496 (Tex. App. 2016).

[60] Applicants' Compliance Filing In Response To Order No. 7 (Public Version), Exhibit 23 May 4, 2020 (Fluor Enterprises, Inc., TAPS DR&R 2005 Cost Estimate, May 2006, https://drive.google.com/file/d/1S0BC4QvQb5JSzMgj7trsQktx0_EdVHhP/view?usp=sharing).

VII. CONCLUSION

Based upon the foregoing, AKPIRG should be permitted leave to file its *Amicus Curiae* brief, the Dismissal Order should be reconsidered, and the Order 6 and 17 appeals should be permitted to proceed.

DATED this 23rd day of August, 2021.

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