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By Larine Moore at 4:36 pm, May 22, 2008

May 22, 2008

Via Courier

Mr. Robert Corbin
Office of Fuels Programs, Fossil Energy
U.S. Department of Energy
Docket Room 3F-056, FE-50
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Washington, DC 20585

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**Re: Motion of Chugach Electric Association, Inc. for Leave to Respond and Response
FE Docket No. 07-02-LNG**

Dear Mr. Corbin:

RECEIVED

By Larine Moore at 10:00 am, May 22, 2008

Enclosed please find an original and 15 copies of Chugach Electric Association, Inc.'s Motion for Leave to Respond and Response. These comments are in response to May 19, 2008 Reply of ENSTAR Natural Gas Company and the May 20, 2008 Reply of ConocoPhillips Alaska Natural Gas Corporation and Marathon Oil Company (collectively, "Applicants") in FE Docket No. 07-02-LNG. Three additional copies are enclosed to be file-stamped and returned to the messenger.

Thank you for your attention to this matter.

Very truly yours,



Eric Redman

Enclosures

cc: Service List
via first class mail and e-mail

**UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY**

In the matter of:)	
)	
CONOCOPHILLIPS ALASKA)	FE DOCKET NO. 07-02 LNG
NATURAL GAS CORPORATION)	
AND)	
MARATHON OIL COMPANY)	

**MOTION OF CHUGACH ELECTRIC ASSOCIATION, INC.
FOR LEAVE TO RESPOND AND RESPONSE**

Pursuant to 10 C.F.R. §§ 590.302(b) and 590.310 of the regulations of the Department of Energy (“DOE”), Chugach Electric Association, Inc. (“Chugach”) hereby requests leave to respond, and responds, to the Comments in the above-captioned proceeding. On April 10, 2008 ENSTAR Natural Gas Company (“ENSTAR”) sent a letter addressed to Robert Corbin at the Office of Fossil Energy (“OFE”), the Decisionmaker in this case, copied 65 highest ranking Alaska public officials, but failed to serve the letter on the parties in this Docket (“ENSTAR Letter”). On May 1, 2008 the OFE issued an order inviting comments, within seven days, on ENSTAR’s *ex parte* communication (“May 1 Order”). On May 8, 2008 Chugach and ENSTAR filed comments in response to the May 1 Order. On May 19, 2008 ENSTAR filed a Motion to Offer Reply Comments and Reply Comments to respond to Chugach’s May 8th Comments (“ENSTAR’s Reply”). On May 20, 2008 ConocoPhillips Alaska Natural Gas Corporation and Marathon Oil Company (collectively, “Applicants”) filed an Answer to the Comments of Chugach (“Applicants’ Reply”).

Chugach respectfully makes the following points in response to the ENSTAR Reply and the Applicants’ Reply:

1. The ENSTAR Letter’s relationship to the merits.

Chugach noted that, on the merits, the ENSTAR Letter proves that meeting local domestic needs for Cook Inlet natural gas now depends on additional exports being authorized, rather than

vice versa. ENSTAR doesn't reply to this point. ENSTAR simply says, in effect, "This is old news – everyone knows it." Precisely. That is Chugach's point, and the Application's fatal flaw.¹

The Applicants, on the other hand, reply that "these are simply commercial considerations and have nothing to do with the reserve-based showing required for export authorization."² Leaving local utilities unable to meet their customers' peak loads unless exports are authorized may have little to do with reserves. It has everything to do with the public interest. That, too, is a showing required for export authorization.

2. "ENSTAR personnel who were unfamiliar with DOE forgot to consult with counsel before sending the April 10 letter."

Chugach believes this statement from ENSTAR Reply is either untrue or seriously misleading. The ENSTAR official who signed the ENSTAR Letter – and who executed the Verification attached to ENSTAR's pleading of January 23 – did not sign the Verification attached to ENSTAR's Reply. The official who signed the ENSTAR Letter is (a) familiar with DOE, and (b) almost certainly consulted with counsel before sending the letter. The same official signed ENSTAR's new gas contracts with the Applicants. Chugach would be surprised if she or others at ENSTAR did not also consult with the Applicants regarding the ENSTAR Letter (see below). Neither ENSTAR's carefully worded statement nor the rest of ENSTAR's Reply – nor the Applicants' Reply – appears to dispute this, or any of the central contentions of Chugach's Comments of May 8. As those Comments note, the truth of this matter could be readily determined through limited discovery. But the truth also seems to be admitted in the carefully-hedged statements of the ENSTAR Reply and the Applicants' Reply.

¹ ENSTAR explains why this news, although supposedly old, was something ENSTAR nonetheless felt a sudden urge to communicate to every public official in Alaska. ENSTAR doesn't explain why it felt the same urge to communicate such ostensibly unimportant information to the decision-maker here.

² Applicants' Reply at 3.

3. Parsing the key sentences of the Applicants' Reply

Like ENSTAR, the Applicants' Reply contains a carefully worded statement – but not a denial – in response to Chugach's Comments of May 8:

Applicants did not *ask* ENSTAR to send the April 10 Letter to DOE/FE. ENSTAR did not share an *advance draft* of the April 10 Letter with Applicants. The first time that Applicants *saw* ENSTAR's letter was when they received a signed copy of the letter *as it was filed*.³

These sentences are very narrow. They don't say the Applicants and ENSTAR did not discuss or agree upon ENSTAR sending the April 10 Letter. And they admit the Applicants did receive copies of the ENSTAR Letter on or about April 10 (unlike other parties in this proceeding). That is what Chugach supposed, and suggested in its Comments of May 8. That is what has significance. The Applicants took no action for another forty (40) days after April 10 – and might never have acted, had Chugach not filed its Comments.

The Applicants' Reply continues, "Applicants had no reason to suspect that ENSTAR had failed to comply with the service requirements set forth in DOE's rules."⁴ This statement seems impossible to credit. *No* reason? The ENSTAR Letter was not even in the form of a pleading. Applicants are on the Service List in this docket, they receive email notice (not just paper copies) when filings are properly made, and they know that Verifications and Certificates of Service are attached to documents properly filed and served, whereas neither was attached to the copies of the April 10 Letter that Applicants received.

4. Straw Men, red herrings, implausibility, and dogs that fail to bark

ENSTAR's reply, in particular, is an exercise in obfuscation and distraction. The undisputed facts are these:

³ Applicants' Reply at 2 (emphasis added)

⁴ *Id.*

(a) The ENSTAR Letter was intended to influence the decision-maker.

(b) The ENSTAR Letter was an improper, prohibited communication. The impropriety is evident on the face of the letter.

(c) No one – neither ENSTAR nor the Applicants – has denied the Applicants’ involvement in or knowledge of the ENSTAR Letter.

(d) Although the ENSTAR Letter was sent on April 10, no one – neither ENSTAR nor the Applicants – took any steps to call attention to it, explain it, or undo its potential harm until a week or more after OFE forced the issue. This is not how one deals with an innocent “mistake.”⁵

(e) Even when OFE issued its May 1 order, neither ENSTAR nor the Applicants reacted as if a genuine mistake had suddenly been called to their attention. ENSTAR waited the full week allowed before offering any explanation. The Applicants did not comment until May 20 – and even then, only in response to Chugach’s Comments.

ENSTAR’s proffered explanation is unconvincing, and – as noted above – apparently misleading in one key respect. But ENSTAR’s reply is unstinting in its effort to distract:

Straw Men. ENSTAR devotes much of its reply to Chugach’s supposed allegation of “conspiracy,” then mocks this as “conspiracy to commit *ex parte* communication.” Chugach never used the word “conspiracy,” nor suggested one. Chugach pointed out that (1) a mistake by ENSTAR shouldn’t harm the Applicants unless they were involved in it or had knowledge of it, but (2) the available facts suggested the Applicants were involved in and/or did have knowledge of the ENSTAR Letter. Based on ENSTAR’s Reply and the Applicants’ Reply, Chugach now takes that

⁵ ENSTAR points out that Chugach recently made a mistaken filing with the Regulatory Commission of Alaska. This mistake was corrected, publicly and without prompting, on the day it was discovered. That is how mistakes are dealt with. (Chugach’s filing was also not addressed to any decision-maker.)

point to have been admitted, *i.e.*, the Applicants apparently were involved and/or knew of the ENSTAR Letter, even if they did not specifically *ask* ENSTAR to send it.

The involvement or knowledge of the Applicants in the prohibited conduct, and their failure to take steps to correct it, are what matter here – not whether they “conspired” with ENSTAR. ENSTAR is effectively immune from significant sanctions in this proceeding; the Applicants are not. Not surprisingly, ENSTAR is out front. The Applicants’ Reply says, in effect, “Well, *we* didn’t send that letter.”

Red Herrings. ENSTAR says it is irrelevant whether the Applicants knew of the *content* of ENSTAR’s April 10 letter, since there is nothing prohibited about the letter’s content. True. What’s relevant is that the Applicants apparently knew in advance, at the time, or shortly thereafter that a prohibited *ex parte* communication had been made in support of their Application – and did nothing to prevent, cure, or deal with it. The evil of *ex parte* communications is not necessarily their content but the very fact that they are *ex parte*, allowing no opportunity for other parties to respond on the merits. If ENSTAR had properly moved on April 10 to file the *content* of its letter in the form of additional comments, Chugach could (and would) have responded at once.

ENSTAR’s Reply contains many other red herrings – including a massive attachment, a PowerPoint presentation that could have been offered into evidence if ENSTAR wanted it considered. ENSTAR argues that Chugach official Suzanne Gibson viewed this particular presentation prior to April 10. That argument could not be less relevant. No one is suggesting that ENSTAR’s communication with Ms. Gibson was improper. If ENSTAR had presented its PowerPoint slides on an *ex parte* basis to the decision-maker here, that would have been just as improper as ENSTAR’s April 10 Letter – regardless of whether that presentation, like the April 10 Letter, was also shown outside the context of this proceeding to every Alaska public official that ENSTAR could think of.

Implausibility. ENSTAR purports to be shocked at the suggestion that anyone would try to put political pressure on the Department or on the OFE. ENSTAR claims it sent copies of its April 10 Letter to virtually all Alaska public officials (and to the Applicants?) only to keep them informed of ENSTAR's efforts to get the Application approved and the gas supply contingency in ENSTAR's proposed new contracts removed. For that, a letter addressed to the public officials would seem sufficient. ENSTAR's letter was addressed to the decision-maker at OFE.

Dogs that fail to bark in the night. Omissions can sometimes be telling, as Sherlock Holmes famously observed about the dog that failed to bark in the night. Here, ENSTAR heaps a great deal of invective and insult on Chugach, impugning Chugach's motives without any evidence – and even denigrating Chugach's prowess in gas contract negotiations while celebrating ENSTAR's own. (Apparently agreeing to pay unprecedented high prices, subject to cut-offs of supply if exports are not approved, is a winning strategy.) But here's what's missing: (a) any response by ENSTAR to what Chugach actually alleges and contends, and (b) any complete and candid response from the Applicants. From these omissions, OFE is entitled to draw its own conclusions.

Respectfully submitted,

CHUGACH ELECTRIC ASSOCIATION, INC.

By 

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Dated: May 22, 2008.

CERTIFICATE OF SERVICE

I herby certify that a true and correct copy of the foregoing document was served by regular mail and by e-mail upon the individuals listed below:

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Dated this 22nd Day of May, 2008



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UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY


In the matter of:)
)
CONOCO PHILLIPS ALASKA)
NATURAL GAS CORPORATION)
AND) FE DOCKET NO. 07-02-LNG
MARATHON OIL COMPANY)

VERIFICATION AND CERTIFICATE OF REPRESENTATION

Eric Redman, being first duly sworn, on oath states, pursuant to 10 C.F.R. § 590.103(b), that he is an attorney at the firm of Heller Ehrman LLP; that he is the authorized representative Chugach Electric Association, Inc. (“Chugach”); that he prepared the Motion of Chugach Electric Association, Inc. For Leave to Respond and Response in the above-referenced proceeding; and that all matters of fact stated therein are true and correct to the best of his knowledge, information and belief.


Eric Redman

SUBSCRIBED AND SWORN to before me this 21st day of May, 2008.


Notary public in and for the State of Washington.
My commission expires: 4-20-09

LAUREE A. LINGENBRINK
STATE OF WASHINGTON
NOTARY — • — PUBLIC
MY COMMISSION EXPIRES 04-20-09