

Greenberg Traurig

Memorandum

TO: Marty Rutherford
FROM: Ken Minesinger and Don Shepler
DATE: February 1, 2008
RE: Public Response to Memorandum by LB&A Counsel Regarding TransCanada's AGIA Application

This memorandum addresses several points of disagreement with the conclusions expressed in the January 23, 2008 memorandum to the Legislative Budget and Audit Committee (LB&A) concerning the Application TransCanada filed under the Alaska Gasline Inducement Act (AGIA) Request for Proposals (RFA).¹

As discussed below, we have reviewed the LB&A Memorandum, and disagree with its conclusions that TransCanada's Application "is inconsistent with AGIA and the RFA" and that TransCanada has placed improper conditions and contingencies on its commitments. To the contrary, and consistent with the Commissioners' January 4, 2008 Completeness Determination, TransCanada's Application unconditionally met the 20 mandatory requirements of AGIA, and is consistent with the RFA.

This memorandum provides a brief explanation of our main areas of disagreement with the LB&A Memorandum. We would be happy to provide, at a later date, a more detailed discussion of the issues raised in the LB&A Memorandum if needed.

I. Loan Guarantee Concept Is Not A Condition.

The unconditional and unequivocal nature of TransCanada's commitments to the AGIA requirements is explained more fully in our January 8, 2008 memorandum, a copy of which is attached. In its Application, in addition to making the commitments required by AGIA, TransCanada also offers several creative ideas to enhance the chances that the project will succeed. One of those ideas, as the LB&A Memorandum notes, is "to use the Federal loan guarantee ... to fund any construction cost overruns." (LB&A Memorandum at 3, quoting TransCanada Application at 16.) LB&A Counsel concludes TransCanada's Application "explicitly states that it is dependent on" (*i.e.*, conditioned on) working out an agreement with the U.S. government regarding use of the federal loan guarantee to fund construction cost overruns. (Memorandum at 3.)

¹ This memorandum uses the term "TransCanada" to refer to the co-Applicants, TransCanada Alaska Company, LLC and Foothills Pipe Lines Ltd.

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However, the conclusion in the LB&A Memorandum is based on an incomplete reading of TransCanada's Application. The full text of the portion of TransCanada's Application cited by the LB&A Memorandum states that the loan guarantee idea would only be pursued if "an acceptable agreement is reached with the U.S. government". (See TransCanada Application at p. 2.2-71.) This means that if the U.S. government does not agree with the loan guarantee idea, TransCanada will not pursue the idea further; however, its AGIA commitments would nevertheless remain valid and have not been conditioned on the idea.

Rather than conditioning the commitments in its Application on the loan guarantee idea (or on anything else), TransCanada commits repeatedly and unconditionally to take all the actions required by AGIA, AS.43.90.130 (the so-called 20 "must-haves"). For example, in its signed Certification and in the cover letter to its Application, TransCanada commits to comply with all of AGIA's requirements, and places no conditions on that unequivocal commitment.

As noted above, our January 8, 2008 memorandum also explains why the loan guarantee concept and similar concepts in TransCanada's Application are not conditions on TransCanada's commitments. Rather, they are creative ideas to address some of the unique hurdles facing the project -- something the RFA encouraged applicants to do.

II. Bridge Shipper Idea Is Not A Condition.

Similarly, TransCanada's Application does not condition its commitments on the bridge shipper idea. TransCanada commits repeatedly and unconditionally to the requirements of AGIA.

In this regard, TransCanada has suggested that in the event of a failed open season, the State and TransCanada should consider seeking to establish a mechanism through which the U.S. Government would assume some or all of the initial risk of the Project by acting as a "bridge shipper." LB&A Memorandum at 4 (quoting TransCanada Application at 16). Based on TransCanada's statement, the LB&A Memorandum asserts that TransCanada's "bridge shipper concept is contingent upon" the State's partnership in and the federal government's agreement to that concept. (Memorandum at 4)

The LB&A Memorandum has misconstrued TransCanada's bridge shipper concept. TransCanada's Application merely states the obvious -- that the bridge shipper concept will not work unless the State and particularly the federal government agree to it. That fact, however, does not mean that TransCanada has improperly conditioned its AGIA commitments on the bridge shipper concept -- despite what the LB&A Memorandum incorrectly implies by citing to the section of the RFA that forbids an applicant from requiring additional actions by the Commissioners. (Memorandum at 4, n.5) TransCanada has merely said that the idea will not work without state and federal support. TransCanada has not, however, required the State or federal government to support the idea.

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III. Other So-Called “Conditions or Contingencies” Are Misconstrued.

Section IV of the LB&A Memorandum discusses several other so-called conditions or contingencies in the TransCanada Application. Here again, the LB&A Memorandum misconstrues AGIA and TransCanada’s Application.² For example:

- **Credit Support Misconception:** The Memorandum appears to fault TransCanada for not agreeing to proceed to the Execution Phase (*i.e.*, for not agreeing to construct the project) if it lacks credit support. (Memorandum at 5; *see also* Memorandum at 8, Section E)
 - However, AGIA does not require, and was never intended to require, a licensee to sanction or build the pipeline if it lacks credit support. (See, for example, AGIA Sections 200(c) and (d) (AS 43.90.200(c) & (d).) It is difficult to conceive that any company would or could construct a project of this size without credit support. Thus, TransCanada’s statement is neither surprising nor inconsistent with AGIA.
- **Additional Actions Are Not “Required” From the State:** The LB&A Memorandum asserts that TransCanada has impermissibly “required” the State to do various things. (Memorandum at 5).
 - However, the Application merely recommends the State take various actions, and offers several suggestions of things the State could do to enhance the prospects that the open season and project will succeed. TransCanada does not make its AGIA commitments conditional or contingent on the State agreeing to these suggestions. TransCanada makes suggestions, but does not require the State to take additional actions beyond those actions identified by AGIA. Indeed, the LB&A Memorandum (at 6) is internally inconsistent, because it also characterizes these as “requests” by TransCanada, not requirements.
- **Prior Engineering Designs and Permits Not Required by AGIA:** The LB&A Memorandum implies that TransCanada has violated AGIA by stating (at p. 2.11-2 of the Application) that assets developed by TransCanada prior to the date of any License award would remain the property of TransCanada. (Memorandum at 7)
 - However, if a project is abandoned, AGIA only requires the licensee to transfer to the State all engineering designs, contracts, permits and other data

² In addition to the issues discussed below, the LB&A Memorandum notes that TransCanada’s Application contains various statements about other issues, such as the need to obtain regulatory approvals, favorable tolls, precedent agreements with a 25-year term, land rights, and a minimum level of volumes. But the Memorandum fails to explain what if anything is wrong with these portions of TransCanada’s Application.

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related to the project that are acquired by the licensee “during the term of the license”. (AS 43.90.240(e).) AGIA does not require the transfer of data acquired by the licensee prior to the date of the license award. Thus, TransCanada’s condition is consistent with AGIA, contrary to what the LB&A Memorandum implies.

- **“Catch-All Contingency” Is Mere Speculation:** The LB&A Memorandum notes that TransCanada says obstacles could arise that would require TransCanada, the State, and others “to explore alternative pathways to a successful project.” (Memorandum at 10) Based on this statement, the LB&A Memorandum speculates that such language “could mean that TransCanada contemplates seeking, on an ongoing basis, additional concessions from the State of Alaska -- something which is not contemplated by AGIA or the RFA.” *Id.* (emphasis added)
 - The LB&A Memorandum’s conclusion that the Application “could mean” TransCanada will seek improper concessions from the State in the future is purely speculative. TransCanada’s actual Application does not seek improper concessions from the State.

IV. The Upstream Fiscal Certainty Concept Is Not A Condition.

TransCanada’s suggestion that the State engage “with the ANS Producers to reach agreement on ... a predictable upstream fiscal regime” is just that: a suggestion, not a condition. (Memorandum at 10) The LB&A Memorandum misinterprets TransCanada’s suggestion, incorrectly concluding that TransCanada has impermissibly conditioned its Application in a manner “not different from the relief long sought by the three major producers. (LB&A Memorandum at 10, quoting TransCanada Application at 2.2-52)

The LB&A Memorandum ignores a fundamental difference between TransCanada’s Application and the approach taken by the three major producers. TransCanada has not conditioned its Application on changing the upstream fiscal regime. TransCanada has merely stated this is an issue it hopes the State will explore if necessary. In stark contrast, the three major producers have consistently said they will not go forward with a pipeline project, or make the commitments required by AGIA, unless the State changes the upstream fiscal regime. Indeed, the recent alternative put forth by ConocoPhillips conditions that alternative on the establishment by the State of a new fiscal framework regarding natural gas production taxes. *See* Letter from J. L. Bowles, President of ConocoPhillips, to Governor Palin, Jan. 24, 2008, at 5 (stating that no party, including ConocoPhillips, “will take these unprecedented investment risks until a number of conditions have been met, including the establishment of a predictable gas fiscal framework,...”) (emphasis added).

While the three major producers have consistently conditioned their willingness to go forward with a gas pipeline project on (among other things) the establishment of a new gas fiscal framework, TransCanada has not. The LB&A Memorandum misperceives this fundamental difference between TransCanada’s Application and the producers’ approach to this issue.

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V. Conclusion

For the reasons explained above, we disagree with the conclusion of the LB&A Memorandum that “TransCanada’s menu of proposals is inconsistent with AGIA and the RFA.” (LB&A Memorandum at 10) The LB&A Memorandum fails to explain how any aspect of TransCanada’s Application is inconsistent with AGIA or the RFA. In its Application, TransCanada unconditionally commits to take all the actions required by AGIA and the RFA.