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Regional Manager



**VIA HAND DELIVERY**

May 2, 2016

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Corri Feige, Director  
Division of Oil and Gas  
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**RECEIVED**

Re: Prudhoe Bay Unit IPA Plan of Development  
Response to Division's Letter of April 11, 2016

**MAY 05 2016**  
**DIVISION OF OIL AND GAS**

Dear Director Feige:

We are responding to your April 11 letter (Division's Letter) seeking additional information about the 2016 Plan of Development (IPA POD). In a separate letter, BPXA, as operator, responded on behalf of all the PBU working interest owners (WIOs), to the non-marketing requirements in the Division's Letter. The following is BPXA's individual response to your demand for marketing information.

In our letter as operator, BPXA emphasized that PBU gas has been extensively used to maximize oil recovery. By expanded gas cycling and continued use of the gas for enhanced oil recovery, we have produced to date over three billion barrels of oil more than originally expected. Our 2016 POD continues to focus on using gas to enhance oil recovery.

Furthermore, in our capacity as a WIO in the PBU, we are taking appropriate actions to support a major gas sale. As an equity owner, we are participating in the Alaska LNG Project (Project) with the State and have taken, and continue to take, the necessary steps to allow the marketing of Alaska North Slope (ANS) gas at the appropriate time. BPXA believes that its previous submission of the IPA POD satisfies the PBUA's and Alaska regulations' requirements. The division's demand for marketing information is unprecedented, beyond the agency's authority, and otherwise unlawful for many reasons, including each of the following:

- 1) **The division's requirement that a WIO must provide marketing information constitutes impermissible rulemaking.** The division requires that each PBU WIO provide gas marketing information as part of the 2016 annual IPA POD review and similar information for each succeeding year's POD. We understand this new "POD requirement" also was included in January letters to operators of other State units on the North Slope and in Cook Inlet. But, marketing information has never been required from any other Alaska-regulated unit as part of the POD process. Such

information has never been required from any federal-regulated unit as part of the federal POD process (upon which the Alaska process is based). The requirement is beyond the division's authority because it is outside the scope of the regulations and constitutes impermissible rulemaking. Before attempting to issue this new "regulation" and assuming there is statutory authority for it, the division must comply with the Alaska Administrative Procedures Act's requirements of public notice and an opportunity to be heard as well as other applicable legal restrictions.

- 2) **Antitrust law precludes the division's requirement that a WIO must provide marketing information.** Sharing commercially sensitive marketing information among competitors or potential competitors raises significant antitrust concerns under both federal and state law. The DNR, on behalf of the SoA, competes with the WIOs in the marketing of in-state oil and, if there is a Project, the DNR may be competing with the WIOs in the marketing of in-state gas and the marketing of LNG. The SoA has already set up a statutory process to allow the DNR to take gas in-kind from WIOs and use that gas to compete with the WIOs. And as noted in our response in objection 6, that team has agreed that this information would be kept confidential from the regulatory part of the DNR, including the division. The SoA cannot avoid these antitrust issues by obtaining the same information through an improper use of the POD process.
- 3) **The division cannot require a WIO to provide marketing information because that information constitutes a trade secret under Alaska law.** The Alaska Uniform Trade Secrets Act (**AUTSA**) gives statutory protection to trade secrets. Oil and gas marketing information fits within the AUTSA's definition of a trade secret as information that
  - (a) derives independent economic value from not being generally known to other persons who can obtain economic value from its disclosure or use, and
  - (b) has been maintained secret.

In agreeing to the confidentiality agreements discussed in our objection 6, the SoA recognized that this type of information was commercially sensitive and not subject to public disclosure.

The SoA, and specifically the DNR, is a competitor of the WIOs in oil marketing and that it may be their competitor in gas and LNG marketing. Requiring a WIO to provide its marketing information to the DNR through the division violates the WIO's trade secret rights, would constitute an unlawful taking of property without compensation, and, as discussed in our objection 2, is precluded by federal and Alaska antitrust laws.

- 4) **The division cannot require marketing information because there is no duty to market gas beyond the local ANS market.** A lessee has no duty to market gas if no market for the gas exists at the well. No non-local market for gas exists on the ANS. So the WIOs have no duty to market gas other than in the local ANS market. And the law is clear that they have no duty to build any pipeline, much less an 800-

mile pipeline, to get the gas to a market. If some other party were willing to bear the risk and the multi-billion dollar cost to build an 800-mile pipeline, then the WIOs might have a duty to market outside the ANS. Today, attempts to build such a massive pipeline remain as speculative as when the Alaska federal district court found the attempt to do so by the Alaska Gasline Port Authority "speculative" and ruled that the alleged non-local market for ANS gas was not "an existing and relevant economic market." See *Alaska Gasline Port Authority v. ExxonMobil Corp.*, No. 4:05-cv-0026-RRB, Order Granting Defendants' Motion to Dismiss (D. Alaska June 19, 2006), at pp. 7-8 and note 21. Until the market exists, no such duty can possibly exist.

- 5) **The division's requirement that BPXA must provide marketing information violates DNR's obligations under the Gas Availability Agreement.** DNR contractually agreed in Section 3 of the Gas Availability Agreement to "negotiate in good faith for the purpose of BP entering into a bilateral agreement with the State or its designee on mutually agreed commercially reasonable terms ... regarding the availability of natural gas ... in the PBU ... in the event, if ever, that the BP ... Project Affiliate becomes a Non-continuing Party." DNR's current effort, through the division, to obtain confidential and proprietary marketing information from BPXA and other PBU WIOs as part of the 2016 annual IPA POD process is an attempt to gain information no other commercial actor would otherwise be able to obtain in a good faith commercial negotiation to buy and sell gas. Maintaining this effort is not only an abuse of the division's regulatory function but violates DNR's express contractual obligation to "negotiate in good faith" with BPXA, violates the obligation of good faith and fair dealing implied in all Alaska contracts, and constitutes an unlawful attempt to impair BPXA's contractual rights in violation of the U.S. and Alaska Constitutions.
- 6) **The division cannot require a WIO to provide marketing information because to do so would violate the Project Confidentiality Agreement (ACA) and BP-State confidentiality agreements.** BPXA has entered into two different confidentiality agreements that limit, but also protect, its ability to share marketing information. The first is the ACA. Its purpose was to allow the parties to share confidential commercial information relating to the Project. The ACA has seven parties including, for the SoA, representatives of the DNR and the DOR. Under the ACA, BPXA is contractually bound to keep information regarding those negotiations confidential. And the SoA, including the DNR, was also so bound.

Under the ACA, the parties have shared appropriate collective marketing information. If BPXA were to share that marketing information with the division, it would breach the ACA because it is required to keep negotiating information shared within those negotiations confidential. The negotiators of the ACA explicitly recognized that confidential commercial information should not be shared with division staff acting in their regulatory capacity. We understand that DNR and DOR have established appropriate firewalls in their organizations to maintain this type of information as confidential from DNR and DOR regulatory staff. Sharing this information further would cause substantial and irreparable harm to BPXA and other WIOs who signed the ACA.

The second agreement is the BPXA-State Confidentiality Agreement. Its stated purpose was to allow BPXA and its affiliates to share with specific SoA representatives "commercial discussions" and specifically "marketing for a North Slope natural gas project ... including ... terms of the sale of gas" under certain circumstances. Again, the SoA representatives able to see the confidential information were restricted to those acting in a proprietary capacity. The information provided by BPXA in those negotiations is among the most sensitive commercial information BPXA possesses. The governor has already made public information regarding the current status of those discussions and their outcome – a Gas Availability Agreement with BPXA. See <http://gov.alaska.gov/newsroom/2015/12/governor-walker-makes-public-signed-gas-availability-agreements/>. Any further disclosure would cause substantial harm to BPXA, and the SoA has already recognized the commercially sensitive and confidential nature of this information.

- 7) **Assuming that BPXA could, and was voluntarily willing to, provide marketing information to the division, the division must agree to hold the information confidential under AS 38.05.035(a)(8).** The division's statement in its April request letter suggests that it *may hold* the marketing information "as appropriate." But the letter also recognizes that the division "will not share or discuss commercially sensitive responses to the demand for marketing information from individual WIOs with other WIOs and will hold information confidential as requested and as appropriate." As discussed earlier, other parts of the SoA have recognized the importance of keeping this information confidential and have signed confidentiality agreements requiring the appropriate SoA representatives to keep the information strictly confidential.

BPXA may be willing to share some information with the division assuming that certain conditions can be met to ensure the disclosure would be lawful. But it would only be willing to do so with the understanding that the division would keep the information confidential under AS 38.05.035(a)(8). The information is among the most commercially sensitive information that BPXA possesses. If the division failed to keep the information confidential, BP would suffer serious adverse consequences because the information:

- contains trade secrets and commercially sensitive information,
- represents work in progress, and
- relies on assumptions that might not be fully described in the summary documents.

So before BPXA would ever consider providing marketing information, the division would have to agree in advance to hold the marketing information confidential and not to use it for any anti-competitive purpose.

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BPXA respectfully requests that the division withdraw its demands for marketing information and find the March 31, 2016 submission of the IPA POD complete.

Sincerely,



Dave Van Tuyl

cc: S. Gould, BPXA