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STATE OF ALASKA

THE REGULATORY COMMISSION OF ALASKA

Before Commissioners:

Kate Giard, Chairman
Dave Harbour
Mark K. Johnson
Anthony A. Price
James S. Strandberg

In the Matter of the Formal Complaint Filed by)
Agrium U.S. Inc. Against MARATHON OIL)
COMPANY and Union Oil Company of California)

P-04-20

ORDER NO. 5

In the Matter of the Formal Complaint Filed by)
Agrium U.S. Inc. Against MARATHON OIL)
COMPANY and Union Oil Company of California)

U-05-20

ORDER NO. 3

**ORDER DECIDING QUESTION 1
AND GRANTING TEMPORARY EXEMPTION**

BY THE COMMISSION:

Summary

We find CIGGS a pipeline subject to jurisdiction under AS 42.05 and grant a comprehensive temporary exemption under AS 42.05.711(d) from the provisions of AS 42.05 to Marathon and Unocal Alaska pending further proceedings. We continue the briefing schedule outlined in Phase One.

1 Background

2 Agrium U.S., Inc. (Agrium) filed a formal complaint¹ against Marathon Oil
3 Company (Marathon) and Union Oil Company of California (Unocal Alaska) (collectively
4 CIGGS Owners) for operating the Cook Inlet Gas Gathering System (CIGGS) in
5 violation of the Alaska Public Utilities Regulatory Act² and the Pipeline Act.³ We found
6 that good cause existed to institute an investigation and opened an investigation into
7 Agrium's Complaint.⁴

8 We granted intervention in the investigation to ENSTAR,⁵ Aurora Gas,
9 LLC and the State of Alaska (the State). A prehearing conference was conducted on
10 January 21, 2005. Agrium, Marathon, Unocal Alaska, ENSTAR and Aurora Gas
11 participated. Those present at the prehearing conference were unable to agree on a
12 preliminary joint statement of issues and, therefore, submitted separate preliminary
13 statements.

14 Based on statements made at the prehearing conference, we recognized
15 that many of the parties had a common procedural concern, that the scope of the
16 investigation was very broad and could become burdensome. We also recognized that
17 we needed to take a strong role in completing this proceeding with the lowest possible

18 ¹*Agrium U.S. Inc.'s Formal Complaint Against Marathon Oil Company and Union*
19 *Oil Company of California for Their Ongoing Violations of the Alaska Public Utilities*
20 *Regulatory Act and the Alaska Pipeline Act Through Providing Unregulated*
21 *Transportation Service and Refusing to Provide Regulated Transportation Service*
22 *Through the Cook Inlet Gas Gathering System*, filed October 1, 2004 (Complaint).

22 ²AS 42.05.

23 ³AS 42.06.

24 ⁴Order P-04-20(2), *Order Finding Good Cause to Investigate Formal Complaint,*
Opening Investigation, Setting Prehearing Conference, and Inviting Intervention, dated
25 December 22, 2004.

26 ⁵ENSTAR Natural Gas Company, a division of SEMCO.

1 cost to all parties. Therefore, we established a sequential pleading process that permits
2 us to focus on whether CIGGS is a jurisdictional pipeline under either AS 42.05 or AS
3 42.06. We identified this process as Phase One.⁶ Phase One consists of submission of
4 specified information by the CIGGS Owners, some limited discovery, and briefing of six
5 questions by the parties. We specified Question One as: Is CIGGS furnishing, by
6 transmission or distribution, gas to the public for compensation within the meaning of
7 AS 42.05.990(4)(D)?

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⁶Order P-04-20(3)/P-05-20(1), *Order Granting Intervention, Defining Adjudicatory Process, Opening New Docket, Establishing Procedural Schedule and Denying Motion for Clarification*, dated March 7, 2005.

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1 Unocal Alaska,⁷ Marathon,⁸ Agrium,⁹ Aurora,¹⁰ and the State¹¹ filed initial
2 and reply briefs on Question 1. ENSTAR filed only an initial brief.¹² As we requested,
3 Unocal Alaska¹³ and Marathon,¹⁴ each filed a list of gas customers with associated gas
4 volumes and destinations for all gas shipped through CIGGS during 2004 and indicated
5 whether those customers, volumes, and destinations were typical of the last three years
6 and the current year. Marathon told us that the detailed information in its customer list

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8 ⁷*Initial Brief of Union Oil Company of California on Question 1*, filed
9 March 22, 2005 (Unocal Alaska Brief); *Reply Brief of Union Oil Company of California*
10 *on Question 1*, filed March 29, 2005.

11 ⁸*Initial Brief of Marathon Oil Company Addressing the Question: Whether the*
12 *CIGGS Owners are “Furnishing by Transmission or Distribution of . . . Gas to the Public*
13 *for Compensation” Within the Meaning of AS 42.05.990(4)(D)*, filed March 22, 2005
14 (Marathon Brief); *Reply Brief of Marathon Oil Company Addressing the Question:*
15 *Whether the CIGGS Owners are “Furnishing by Transmission or Distribution of . . . Gas*
16 *to the Public for Compensation” within the Meaning of AS 42.05.990(4)(D)*, filed
17 March 29, 2005 (Marathon Reply Brief).

18 ⁹*Agrium U.S. Inc.’s Opening Brief Addressing Question 1: Is the CIGGS*
19 *Furnishing, by Transmission or Distribution, Gas to the Public for Compensation Within*
20 *the Meaning of AS 42.05.990(4)(D)?*, filed March 22, 2005; *Agrium U.S. Inc.’s Reply*
21 *Brief to Question 1 Opening Briefs*, filed March 29, 2005 (Agrium Reply Brief).

22 ¹⁰*Aurora Gas, LLC’s Opening Brief on the Issue of Whether CIGGS is Furnishing,*
23 *by Transmission or Distribution, Gas to the Public for Compensation Within the Meaning*
24 *of AS 42.05.990(4)(D)*, filed March 22, 2005; *Aurora Gas, LLC’s Reply Brief on the*
25 *Issue of Gas Transmission by CIGGS*, filed March 29, 2005 (Aurora Reply Brief).

26 ¹¹*State of Alaska’s Response to Commission Question 1*, filed March 22, 2005;
State Reply to CIGGS Owners’ Opening Briefs on Question 1, filed March 29, 2005
(State Reply Brief).

¹²*ENSTAR’s Opening Memorandum on Question No. 1*, filed March 22, 2005.

¹³Letter from Bradford G. Keithley with two-page attachment, dated
March 15, 2005; Letter from Bradford G. Keithley with revised two-page attachment,
dated March 29, 2005 (collectively Unocal customer list).

¹⁴*Notice of Submission with attached Summary of CIGGS Deliveries—for the*
Year 2004, filed March 15, 2005; *Notice of Updated Submission with attached*
Summary of CIGGS Deliveries—for the Year 2004, filed March 24, 2005 (collectively,
Marathon customer list).

1 is representative of 2002, 2003, and the current year.¹⁵ Unocal Alaska told us that its
2 information was also representative, except volumes delivered to ENSTAR.¹⁶

3 Discussion

4 To determine if CIGGS is subject to our jurisdiction under AS 42.05, as
5 Agrium asserted in its Complaint, we asked the parties to brief whether CIGGS, as
6 currently operated, meets the statutory definition of “public utility.”¹⁷ AS 42.05.990(4)(D)
7 defines “public utility,” in part, as including:

8 every corporation whether public, cooperative, or otherwise, company,
9 individual, or association of individuals, their lessees, trustees, or
10 receivers appointed by a court, that owns, operates, manages, or controls
any plant, pipeline, or system for . . .

11 (D) furnishing by transmission or distribution of natural or
12 manufactured gas to the public for compensation.

13 The term “public” in subsection (4)(D) is further clarified by AS 42.05.990(3) as:

14 (A) a group of 10 or more customers that purchase the service or
15 commodity furnished by a public utility;

16 (B) one or more customers that purchase electrical service for use
17 within an area that is certificated to and presently or formerly served by an
18 electric utility if the total annual compensation that the electrical utility
receives for sales of electricity exceeds \$50,000; and

19 (C) a utility purchasing the product or service or paying for the
20 transmission of electric energy, natural or manufactured gas, or petroleum
21 products that are re-sold to a person or group included in (A) or (B) of this
22 paragraph or that are used to produce the service or commodity sold to
23 the public by the utility.

24 ¹⁵*Notice of Submission at 2.*

25 ¹⁶Page 1 of attachment to letter from Bradford G. Keithley, dated March 15, 2005.

26 ¹⁷Order P-04-20(3)/P-05-20(1).

1 For purposes of our analysis, we divide AS 42.05.990(4)(D) into three
2 parts to evaluate whether CIGGS is jurisdictional. First, we review the operations of
3 CIGGS to determine whether it is a pipeline that furnishes gas by transmission.¹⁸
4 Second, we review whether CIGGS furnishes gas by transmission to the public. Third,
5 we review whether CIGGS furnishes gas by transmission to the public for
6 compensation.

7 Does CIGGS Furnish Gas by Transmission?

8 The CIGGS Owners, Marathon and Unocal Alaska, argued that the
9 pipeline operates as a gathering line and not a transmission line. Marathon stated that
10 CIGGS was originally constructed in 1971 by the CIGGS Owners as a field gathering
11 line and, as is characteristic of field gathering lines, CIGGS collects gas from a number
12 of producing properties and producing facilities located along much of its length.
13 Marathon supported its argument by offering the following description of the pipeline
14 system:

15 CIGGS begins at the Trading Bay Production Facility on the west side of
16 Cook Inlet, where gas from offshore production platforms in the Trading
17 Bay Unit and McArthur River Field is put into the lines. From the Trading
18 Bay Production Facility, CIGGS extends about 26 miles, picking up gas
19 from other fields, including from offshore platforms at Granite Point and
20 from several onshore points, to an interconnection with the Beluga
21 Pipeline at Granite Point. From the interconnection with Beluga Pipeline,
22 CIGGS crosses under the Cook Inlet (approximately 22 miles), then
continues on-shore for about 4.5 miles where it connects to KPL Junction,
a hub where pipelines from several different fields come together. The
pipelines converging at KPL Junction include Marathon's Kenai Nikiski

23 ¹⁸Unocal Alaska observed that no party to this proceeding has contended that
24 CIGGS has been used for distribution of gas and that the only question has been
25 whether CIGGS is used for transmission of gas. Unocal Alaska Brief at 4. Because no
26 party contends that CIGGS furnishes gas by distribution we do not discuss distribution
in this Order.

1 Pipeline (“KNPL”), Unocal’s unregulated Swanson River Pipeline,
2 ConocoPhillips’ unregulated Tyonek Pipeline, and the Alaska Pipeline
3 (APL). From KPL Junction, CIGGS extends about a mile to its termination
4 point near Nikiski, where it connects Unocal and Marathon’s production
5 with the industrials located there (including primarily the Agrium fertilizer
6 plant, the Marathon/ConocoPhillips LNG plant, and the Tesoro Refinery).¹⁹

7 Marathon distinguished its activities as a gas producer using its own line
8 to gather and deliver natural gas from those of a pipeline transmission service. It is the
9 pipeline transmission service that would give rise to the status of public utility, Marathon
10 asserted.²⁰ Marathon quoted *Clajon Gas Co., L.P. v. Commissioner* to illustrate the
11 differences between a gathering pipeline and a transmission pipeline. In *Clajon*, the
12 court stated,

13 Gas typically flows from the well to a gathering system through “gathering
14 pipelines” and the gathering system then aggregates the gas for delivery
15 to a gas processing plant, transmission pipeline or other central point.²¹

16 Marathon argued that it “furnishes by gathering” and uses its own facilities
17 to bring its own gas to the point of sale and concluded that those activities are excluded
18 from the scope of AS 42.05. Marathon further stated that if the Legislature had intended
19 gathering lines. like CIGGS. to be regulated as public utilities, it would not have limited
20 the phrase “furnishing gas” in its definition of public utility to “furnishing gas by
21 transmission and distribution.”²²

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23 ¹⁹Marathon Brief at 5-6

24 ²⁰*Id.* at 9.

25 ²¹*Clajon Gas Co., L.P. v. Commissioner*, 354 F.3d 786, 787 (8th Cir. 2004).

26 ²²Marathon Brief at 10-11.

1 Unocal Alaska explained that it is a co-owner and separate capacity
2 holder in CIGGS. Unocal Alaska joined Marathon's argument that CIGGS functions as
3 a gathering line asserting, "the primary function of Unocal Alaska's interest in CIGGS is
4 to gather gas to a central point, not to serve as a transmission line."²³

5 Unocal Alaska cited a regulation²⁴ that lists three different kinds of gas
6 facilities—gathering, transmission and distribution—and asserted that
7 AS 42.05.990(4)(d) limits our jurisdiction to transmission and distribution lines only and
8 that we have no jurisdiction over gathering lines.

9 Unocal Alaska further argued that we recognized these jurisdictional limits
10 in our past actions. Unocal Alaska observed that CIGGS has existed since the 1960s
11 and that when we certificated the Beluga Pipeline, which is fed by CIGGS, in March
12 1993, we did not require AS 42.05 certification for CIGGS. Unocal Alaska concluded
13 we properly applied AS 42.05.990(4)(D) at that time and recognized our jurisdiction
14 extended only to transmission and distribution pipelines and not to gathering facilities
15 like CIGGS. Unocal Alaska stated that "the facts related to CIGGS have not changed
16 since that time; and neither should the jurisdictional consequence."²⁵

17 Unocal Alaska also referenced 3 AAC 48.277(5) – (8) in which we adopted
18 the Federal Energy Regulatory Commission's (FERC's) Uniform System of Accounts for
19 natural gas companies. Under that system of accounts, gas utilities are required to

21 ²³Unocal Alaska Brief at 10.

22 ²⁴3 AAC 52.080(1) states:

23 "accident" means an accident or incident occurring in the state involving
24 escape of gas from gas gathering, transmission or distribution facilities
25 resulting in personal injury requiring hospitalization, fatality, or property
26 damage exceeding \$1,000.

²⁵Unocal Alaska Brief at 10.

1 classify gathering facilities together with production facilities in their plant accounts while
2 transmission facilities are separately classified.²⁶ Unocal Alaska explained that the
3 Uniform System of Accounts for natural gas companies provides a definition of
4 transmission pipelines:

5 Transmission system means . . . equipment used primarily for transmitting
6 gas from a . . . gathering system . . . to one or more distribution areas.
7 The transmission system begins at the outlet side of the valve at . . . the
8 connection to gathering lines . . . and ends at the outlet side of the
9 equipment which meters or regulates the entry of gas into the distribution
10 system or into a storage area.²⁷

10 According to Unocal Alaska, the Uniform System of Accounts does not contain a
11 definition for a “gathering” facility. However, Unocal Alaska asserted, there is a
12 significant body of law describing the meaning of the term. The FERC has developed a
13 primary function test, Unocal Alaska further asserted, to determine whether a facility is a
14 gathering facility:

15 Under section 1(b) of the NGA, the Commission’s [FERC’s] jurisdiction
16 does not extend to facilities used for “the production or gathering of natural
17 gas” or to gathering services. The Commission [FERC] has, over the
18 years, developed a number of legal tests to determine which facilities are
19 non-jurisdictional gathering facilities and which are jurisdictional
20 transmission facilities. The Commission [FERC] presently relies on the
21 modified “primary function test,” which includes consideration of several
22 physical and geographic factors, including: (1) the length and diameter of
23 the pipelines; (2) the extension of facilities beyond the central point-in-the-
24 field; (3) the facilities’ geographic configuration; (4) the location of

25 ²⁶ *Id.* at 5.

26 ²⁷ 18 C.F.R. Part 201, Definition 29.B.

1 compressors and processing plants; (5) the location of wells along all or
2 part of the facilities; and (6) the operating pressures of pipelines.²⁸

3 Unocal Alaska concluded that under the FERC criteria, CIGGS qualifies
4 as a gathering facility because its primary function is to collect gas from a number of
5 production points for delivery to one or more central points. CIGGS gas is delivered to
6 a central point in Nikiski (on the east side of Cook Inlet) or to a central point on the west
7 side of Cook Inlet from which gas subsequently is transported by certificated
8 transmission facilities to consuming markets.²⁹

9 Unocal Alaska predicted that if we decide pipeline facilities used to
10 connect wellhead points of production to certificated transmission lines are jurisdictional,
11 important dollars will be diverted away from exploration and development activities
12 because of significant additional regulatory costs. Unocal Alaska warned us to carefully
13 consider the jurisdictional reach of AS 42.05.990(4)(D) and not extend its scope beyond
14 what the statute and our regulations already provide.

15 The opposing parties, Agrium, Aurora, and the State, disagreed with the
16 CIGGS Owners' position that CIGGS is not used for "transmission" but instead is used
17 exclusively as a gathering line.

18 Agrium contended that we have applied the plain meaning of the term
19 "transmission" under the AS 42.05 for three decades and that the CIGGS Owners'
20 argument that CIGGS is not performing a "transmission" function does not merit serious
21 consideration.³⁰ Agrium reminded us that AS 42.05 and AS 42.06 must be broadly and
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23 ²⁸Unocal Alaska Brief at 7, quoting *Equitrans, L.P.*, 109 FERC ¶ 61,209 at
24 61,995.

25 ²⁹*Id.*

26 ³⁰Agrium's Reply Brief at 12.

1 not narrowly or restrictively construed.³¹ Both Agrium and Aurora asserted that we
2 should consider the Alaska Supreme Court's admonition in *Tesoro Alaska Petroleum*
3 *Co. v. Kenai Pipe Line Co.* that regulatory statutes are to be interpreted liberally.³²

4 Agrium stated that the CIGGS Owners argued for an overly-technical and
5 restrictive reading of the jurisdictional definition of public utility when they argued that
6 CIGGS is not used for the "transmission" of gas.³³ Agrium observed that regulated
7 pipelines such as Alaska Pipeline Company (APLC), the Beluga Pipeline System and
8 the Kenai Nikiski Pipeline System perform a function identical to CIGGS' function.³⁴
9 Aurora stated that the proper focus should be on the functions performed by CIGGS,
10 rather than on the individual activities of the CIGGS Owners and questioned whether
11 there would be any doubt that CIGGS is rendering public utility service if it were owned
12 and operated by Alaska Pipeline Company (APLC) or Chugach Electric Association
13 (Chugach).³⁵

14 Aurora stated that, if CIGGS performs a transmission function, it can be
15 subject to our jurisdiction even though CIGGS also performs a gathering function.³⁶ The
16 State agreed. It asserted:

17 The recent filings of the CIGGS owners summarizing the 2004 shipments
18 over CIGGS established that a significant volume of the gas shipped is
19 delivered for sale to the public (utilities), and suggest that those shipments
20 are more properly characterized as "transmission" under the FERC

21 ³¹*Id.* at 2.

22 ³²Aurora Reply Brief at 4 and Agrium Reply Brief at 3-4, quoting *Tesoro Alaska*
Petroleum Co. v. Kenai Pipe Line Co., 746 P.2d 896, 906 (Alaska 1987).

23 ³³Agrium Reply Brief at 5.

24 ³⁴*Id.* at 7.

25 ³⁵Aurora Reply Brief at 2.

26 ³⁶*Id.* at 7.

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physical and geographic factors. CIGGS is therefore functioning as a “public utility” subject to regulation under AS 42.05 regardless of whether CIGGS has a substantial or even a primary additional function that can be classified as “gathering.”³⁷

The State further asserted:

It appears to be beyond dispute however, that a major component of the CIGGS system – the dual ten-inch marine pipelines that run from a Granite Point connection with the 16-inch CIGGS west side pipeline to Nikiski on the east side of Cook Inlet – does not directly connect to any wells or production leaseholds, and is a physically and geographically distinct pipeline facility from the CIGGS west side pipeline system. One major CIGGS component thus appears likely to fall outside of the “gathering” classification under FERC test based on facts and common knowledge.³⁸

The State’s argument precisely summarizes the factual circumstances of CIGGS today. We find that CIGGS functions both as a gathering line and as a transmission line and further find that it is unnecessary for us to find whether CIGGS functions primarily as a gathering line or primarily as a transmission line. Our statute contains no exemption for gathering lines. Thus, if a facility otherwise meets the definition of public utility by furnishing gas by transmission, the fact that the facility also performs a gathering function is irrelevant to jurisdiction under AS 42.05, though it may bear on the question of exemption from AS 42.05 regulation and in fashioning any final remedies. We have jurisdiction to regulate the system of pipe, including the portions that perform gathering functions.

The CIGGS Owners’ arguments that CIGGS remains a gathering line from start to finish, however, are not plausible. As observed by the State, “CIGGS’

³⁷ State Reply Brief at 2-3.

³⁸ *Id.* at 8.

1 continuing operation of its extensive off-the-leasehold pipeline facilities without any
2 regulation by the Commission is in fact a nearly unique situation in Alaska.”³⁹

3 We do not know if CIGGS was ever a pure gathering system. However, it
4 is historically accurate to describe it as a closed system traversing the Cook Inlet. The
5 construction of the Beluga pipeline opened CIGGS on the west side of Cook Inlet and,
6 at the same time, clearly delineated the pipeline into distinct gathering and transmission
7 functions.

8 While repetitive, it is also instructive to again review Marathon’s
9 description of the CIGGS system. We find it is possible, just from this description, to
10 categorize the dual nature of this pipeline into gathering and transmission functions.

11 Gathering Functions:

12 CIGGS begins at the Trading Bay Production Facility on the west side of
13 Cook Inlet, where gas from offshore production platforms in the Trading
14 Bay Unit and McArthur River Field is put into the lines. From the Trading
15 Bay Production Facility, CIGGS extends about 26 miles, picking up gas
16 from other fields, including from offshore platforms at Granite Point and
from several onshore points, to an interconnection with the Beluga
Pipeline at Granite Point.⁴⁰

17 Transmission Functions:

18 From the interconnection with Beluga Pipeline, CIGGS crosses under the
19 Cook Inlet (approximately 22 miles), then continues on-shore for about 4.5
20 miles where it connects to KPL Junction, a hub where pipelines from
21 several different fields come together. The pipelines converging at KPL
22 Junction include Marathon’s Kenai Nikiski Pipeline (“KNPL”), Unocal’s
23 unregulated Swanson River Pipeline, ConocoPhillips’ unregulated Tyonek
24 Pipeline, and the Alaska Pipeline (APL). From KPL Junction, CIGGS
extends about a mile to its termination point near Nikiski, where it

25 ³⁹ *Id.* at 4.

26 ⁴⁰ Marathon Brief at 5.

1 connects Unocal and Marathon's production with the industrials located
2 there (including primarily the Agrium fertilizer plant, the
3 Marathon/ConocoPhillips LNG plant, and the Tesoro Refinery).⁴¹

4 We decide CIGGS operates as a transmission pipeline and we next
5 consider the issue of whether CIGGS transmits gas to the public.

6 Does CIGGS Furnish Gas by Transmission to the Public?

7 CIGGS furnishes gas by transmission to the public if it furnishes gas by
8 transmission to ten or more customers⁴² or to a public utility. Upon review of the
9 customer lists provided by the CIGGS Owners, we conclude that CIGGS transmits gas
10 to the public as defined by AS 42.05.990(3). We find the pipeline is used to furnish gas
11 to APLC, a natural gas transmission utility owned by SEMCO and to electric utilities
12 Chugach and Homer Electric Association via a cogeneration facility. Those entities are
13 public utilities as defined in AS 42.05 and CIGGS therefore is used to furnish gas to the
14 public.

15 We do not address two issues raised by Unocal Alaska regarding the joint
16 ownership of CIGGS—its contention that it does not transmit gas to the public⁴³ and its
17 suggestion that the jurisdiction of CIGGS under AS 42.05 should be bifurcated. Rather
18 we make a general factual finding that CIGGS, the system, is used to furnish gas to the
19 public and leave factual distinctions between the two owners and possible bifurcation of
20

21 ⁴¹Marathon Brief at 5-6.

22 ⁴²No party contended that CIGGS furnishes gas by transmission to ten or more
23 customers and we do not discuss that portion of the definition of "public" in this Order.

24 ⁴³We do not consider transmission of gas to APLC in January and February
25 2004, described by Unocal Alaska, to constitute transmission to the public for
26 compensation because this event is distinguishable as emergency and remedial in
nature.

1 jurisdiction to be decided after the parties complete the briefing cycle for Question Two
2 if this Phase.

3 Does CIGGS Furnish Gas by Transmission to the Public for Compensation?

4 Thus far we concluded that CIGGS is a transmission pipeline as well as a
5 gathering pipeline and that CIGGS is used in its transmission capacity to transmit gas to
6 the public. We now address compensation for transmission which is the third
7 component of AS 42.05.990(D)(4).

8 Marathon asserted that no utility pays Marathon for transmission service,
9 therefore, CIGGS is not a public utility. Marathon stated its customers pay a price for
10 the gas commodity that does not vary with the supply source, pipeline tariff or
11 transportation route. Marathon stated it absorbs the costs of moving its product to the
12 customer as part of Marathon’s marketing expense.⁴⁴ Marathon stated that it “has
13 discretion to select which pipelines and which sources of supply to use to fulfill its
14 obligations to supply the gas commodity, and there is no transportation charge added to
15 the commodity price.”⁴⁵ Marathon stated there is no basis on this record from which we
16 could find that any such “paying utility” exists.⁴⁶

17 Marathon described its use of CIGGS to move production to the
18 interconnection with the Beluga Pipeline where it is transported to Chugach and APLC;
19 to the cogeneration facility located within the Agruim plant at Nikiski, and to the KPL
20 Junction where gas is sold to APLC.⁴⁷

21 In the case of each sale to a utility, Marathon uses CIGGS to move gas
22 from the wellhead to the point of sale or to the point of receipt into an

23 ⁴⁴Marathon Reply Brief at 9.

24 ⁴⁵Marathon Brief at 12.

25 ⁴⁶Marathon Reply Brief at 10.

26 ⁴⁷Marathon Brief at 7.

1 interconnecting pipeline. The sale occurs after the movement on CIGGS
2 is completed, so the point of sale is downstream of CIGGS or at the
3 downstream end of CIGGS. In none of these cases does the utility pay
4 any compensation, nor is the utility separately charged for gathering,
5 transmission, or distribution by Marathon. The cost of moving the gas
6 over CIGGS to the point of sale is always borne by Marathon. The price
7 of the gas to the utility does not depend on whether any pipeline facility,
including CIGGS, is used or not used, and the price of the gas does not
vary with the costs of transporting on whatever pipeline facility or facilities
may be used.⁴⁸

8 Agrium argued against Marathon's assertion that it does not use CIGGS to
9 furnish gas to the public for compensation because there is no additional transportation
10 charge added to the price it charges utility gas customers. Agrium stated that "[e]ven if
11 no distinguishable transportation charge can be identified, it does not follow that
12 Marathon does not receive compensation for furnishing gas through CIGGS."⁴⁹ Agrium
13 argued that Marathon is compensated for "transmission" based on the delivered price in
14 the same fashion as Marathon is compensated for "transmission" for gas through KNPL
15 or Beluga. Agrium concluded that Marathon includes the price of "transmission" within
16 the price of the gas it provides on a delivered basis.⁵⁰

17 Aurora echoed Agrium sentiments that the price of gas delivered to utilities
18 appears to be transmitted through CIGGS on a delivered-price basis, as envisioned by
19 AS 45.02.319(a)(2), which states, "when the term is F.O.B. the place of destination, the
20 seller must, at the expense and risk of the seller, transport the goods to that place and
21 there tender delivery of them in the manner provided in AS 45.02.503."⁵¹ Aurora argued

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23 ⁴⁸ *Id.* at 7-8.

24 ⁴⁹ Agrium Reply Brief at 21.

25 ⁵⁰ *Id.* at 22.

26 ⁵¹ Aurora Reply Brief at n.8.

1 that “[i]t is simply not credible to assume that Marathon’s delivered-price fails to include
2 a component to cover usage of the CIGGS transportation infrastructure, even if that
3 component is not separately itemized. Compensation for the transmission of the gas is
4 implicitly being paid in the delivered-price.”⁵²

5 We agree. We find the price utilities and other customers pay for gas at a
6 particular point of sale necessarily includes the cost to transport the gas to that point,
7 just as much as it includes the cost of producing that gas. As an unregulated pipeline,
8 CIGGS has had the flexibility to express its pricing policies without regard to a tariffed
9 transportation rate. Given the age of the pipeline, there is a significant likelihood that
10 much of the infrastructure has been depreciated under Generally Accepted Accounting
11 Principles, but operating maintenance and other costs exist and are somehow
12 economically incorporated in the business model of gas sales and delivery.

13 We intentionally limited discovery during this phase of the process to
14 reduce litigation costs to all parties. We have authority to compel discovery of all gas
15 contracts and of the pricing policies and cost accounting records of CIGGS Owners if
16 necessary to build a more complete record on the issue of compensation. However, we
17 believe it is unnecessary to venture further into this area. We find it strains common
18 sense for Marathon to allege that it absorbs the costs of moving its product to the
19 customer as part of Marathon’s marketing expense.⁵³ Absorbing costs into marketing
20 expense does not make them disappear. Marketing, production, overhead,
21 transportation, litigation and profit margin are all components considered when the
22 selling price is established. The transportation element is commonly identified as a
23 separate component of any business arrangement when shipment is made on a tariffed

24 ⁵² *Id.* at 8-9.

25 ⁵³ Marathon Reply Brief at 9.

1 pipeline (such as the case with APLC). CIGGS has been a private pipeline with no
2 third-party shippers so there has been no historical business reason for the
3 transportation component to be separately calculated, identified or charged. Marathon's
4 argument is a convenient use of circumstance but it is not convincing.

5 After carefully considering the facts and arguments presented by the
6 parties, we conclude that CIGGS furnishes gas by transmission to the public for
7 compensation within the meaning of AS 42.05.990(4)(D).

8 Under AS 42.05.990(4) any company owning a pipeline or system that
9 furnishes natural gas by transmission to the public for compensation is a public utility.
10 Both Unocal Alaska and Marathon own an interest in CIGGS. Therefore, we find
11 Unocal Alaska and Marathon are public utilities subject to our jurisdiction under
12 AS 42.05.

13 This determination is consistent with the decision in Docket U-70-73 that
14 Unocal Alaska and Marathon, as owners of KNPL, were subject to jurisdiction under
15 AS 42.05 as public utilities.⁵⁴ Marathon argued that the KNPL decision is an anomaly
16 and that the consistently applied modern regulatory practice is not to require certification
17 for producers who use their upstream pipe to move gas destined for sale to public
18 utilities.⁵⁵

19 We strongly disagree. We believe the KNPL decision correctly interprets
20 the statute and, further, that it provides us with a viable strategy to consider in
21 determining the level of regulation we choose to assert over CIGGS. In that decision,
22 the APUC acknowledged:

23 _____
24 ⁵⁴1 APUC 281 (1971) (Order U-70-73(2), dated September 28, 1971). Docket
25 U-70-73 is titled *In the Matter of the Certification of UNION OIL COMPANY and*
26 *MARATHON OIL COMPANY.*

⁵⁵Marathon Reply Brief at 5.

1 the reluctance of the Applicants to submit all of their pipeline operations to
2 regulation as a public utility, particularly in view of the extremely small
3 percentage of the total pipeline capacity dedicated to public utility service.
4 On the other hand, the Commission must recognize its obligation to
5 protect the interest of all ultimate utility customers who depend on the
6 Applicants for the gas they use regardless of the fact that their usage is
7 only a minuscule part of the gas transmitted by the Pipeline.⁵⁶

8 Thirty-four years later, we still have an obligation to protect the interest of
9 all ultimate utility customers who depend on CIGGS for natural gas. ENSTAR made
10 clear its concern that “no matter what this Commission determines in this docket, that it
11 not do anything that reduces the existing flow of gas over CIGGS, especially the flow of
12 gas to utilities like ENSTAR.”⁵⁷ ENSTAR stated that it has “relied on the fact that its
13 supplier Marathon owns capacity on CIGGS and is free to use that capacity to serve
14 ENSTAR’s requirements, regardless of any other demand.”⁵⁸ ENSTAR stated that
15 curtailment of ENSTAR’s residential and commercial customers is not practical.
16 ENSTAR asked that, if we regulate CIGGS, we “do so in a way that preserves the
17 capacity rights of the existing shippers and their customers, and provides a utility priority
18 (applicable to both utilities and shippers who supply utilities) in the event of a capacity
19 constraint.”⁵⁹

20 Marathon pointed out that “[t]here are not substantial volumes of pipeline
21 quality gas accessible to CIGGS that are not moving to market already. The small
22 volumes that have been identified could be moved by private carriage arrangements.”⁶⁰

23 ⁵⁶1 APUC 281, 283 (1971) (Order U-70-73(2), dated September 28, 1971).

24 ⁵⁷*ENSTAR’s Opening Memorandum on Question No. 1* at 2, filed
25 March 22, 2005.

26 ⁵⁸*Id.* at 3.

⁵⁹*Id.* at 3-4.

⁶⁰Marathon Brief at 14.

1 Marathon further warned us to consider the substantial costs that would be imposed (by
2 regulation) both in dollars and in lost gas production and describes in detail the
3 modifications which might need to be made to the pipeline in terms of measurement and
4 control facilities.⁶¹ Marathon concludes that the end result would be counterproductive
5 to the public interest, which it describes is to maximize gas production in Cook Inlet.⁶²

6 We take these arguments seriously and, as a result, will be mindful to rest
7 the mantle of regulation appropriately around this pipeline. Fortunately, regulation
8 under AS 42.05 is flexible and we have a great deal of discretion to act in the public
9 interest.⁶³ We can protect the interests of the public — utilities and utility customers,
10 gas producers and consumers, gas buyers and sellers — by regulating CIGGS to the
11 exact extent necessary to achieve that protection without overburdening the CIGGS
12 Owners. We seek balance; the parties need to seek balance; and we will continue to
13 maintain a firm hand guiding this process. By this initial decision, we do not subject
14 Marathon or Unocal Alaska to a “panoply of burdensome, costly, inappropriate,
15 inapplicable and unnecessary regulation.”⁶⁴

22 ⁶¹ *Id.* at 16.

23 ⁶² *Id.* at 17.

24 ⁶³ Under AS 42.05.711(d) we can exempt the owners of CIGGS from some or all
of the provisions of AS 42.05 if it is in the public interest to do so.

25 ⁶⁴ Marathon Reply Brief at 3.

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To further that objective, we grant Marathon and Unocal Alaska a temporary exemption from all the provisions of AS 42.05 while we complete Phase One of these proceedings.

ORDER

THE COMMISSION FURTHER ORDERS:

1. The owners of the Cook Inlet Gas Gathering System, Marathon Oil Company and Union Oil Company of California, are public utilities subject to the jurisdiction of this Commission.

2. Marathon Oil Company and Union Oil Company of California are granted a temporary exemption under AS 42.05.711(d) from all provisions of AS 42.05, pending further order of this Commission.

DATED AND EFFECTIVE at Anchorage, Alaska, this 22nd day of April, 2005.

BY DIRECTION OF THE COMMISSION
(Commissioners Dave Harbour and
James S. Strandberg, not participating.)

(S E A L)