IN THE SUPREME COURT OF THE STATE OF ALASKA

CITY OF VALDEZ, Appellant, v. REGULATORY COMMISSION OF ALASKA, HILCORP ALASKA, LLC, HARVEST ALASKA, LLC, HARVEST MIDSTREAM I, L.P., HILCORP ENERGY I, L.P., AND HILCORP ENERGY COMPANY, BP PIPELINES (ALASKA) INC., AND BP CORPORATION NORTH AMERICA INC. Appellees.	)	Supreme Court No. S-18178

Trial Court Case Nos. 3AN-20-05915CI, 3AN-21-04104CI

APPEAL OF THE DECISION OF THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT, STATE OF ALASKA
THE HONORABLE CATHERINE M. EASTER

BRIEF OF APPELLANT, CITY OF VALDEZ

Robin O. Brena, AK Bar No. 8410089
Anthony S. Guerriero, AK Bar No. 8509123
Laura S. Gould, AK Bar No. 0310042
Brena, Bell & Walker, P.C.
810 N Street, Suite 100
Anchorage, Alaska 99501
Telephone: (907) 258-2000
Facsimile: (907) 258-2001
Email: rbrena@brenalaw.com
aguerriero@brenalaw.com
lgould@brenalaw.com

Filed in the Supreme Court of the State of Alaska, this ___ day of _____, 2021.

By _____
(Deputy) Clerk of Court

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii
TABLE OF ACRONYMS AND ABBREVIATIONS vi
PROVISIONS PRINCIPALLY RELIED UPON ix
JURISDICTIONAL STATEMENT 1
STATEMENT OF THE ISSUES 1
STATEMENT OF THE CASE 3
STANDARD OF REVIEW 13
ARGUMENT 15
I. SUMMARY OF ARGUMENT 15
II. VALDEZ HAS STANDING TO APPEAL ORDER 17 23
A. Valdez Participated in Docket P-17-019. 24
B. Valdez Was Directly Interested in Docket P-19-017 and Was Factually Aggrieved by Order 17. 25
III. VALDEZ EITHER EXHAUSTED ITS ADMINISTRATIVE REMEDIES OR WAS EXCUSED FROM DOING SO 33
A. The Superior Court Erroneously Asserted that Because "Valdez Did Not Move to Intervene in P-19-017, Despite Stating in Its Initial Comments that It Would Do So," Valdez Did Not Exhaust Administrative Remedies. 34
B. The Superior Court Erroneously Asserted that Because "Valdez Did Not File a Protest to the Application in P-19-017," Valdez Did Not Exhaust Administrative Remedies. 36
C. The Superior Court Erroneously Asserted that Because "Valdez Did Not File a Competing Application to P-19-017," ValdezDid Not Exhaust Administrative Remedies. 38
D. The Superior Court Erroneously Asserted that Because "Valdez Did Not Oppose the Confidential Treatment of Any Documents Other than Those at Issue in Order 6, and Did Not File Any Responsive Pleadings to Any Motion in P-19-017," Valdez Did Not Exhaust Administrative Remedies. 38

TABLE OF CONTENTS

E. The Superior Court Erroneously Asserted that Because "Valdez Did Not Utilize or Exhaust the RCA's Procedures to Access Confidential Documents," Valdez Did Not Exhaust Administrative Remedies. 42

F. The Superior Court Erroneously Asserted that Because "Valdez Did Not Provide the RCA with Any Other Meaningful Indication that It Believed the Agency's Procedures for Receiving Public Input Were Deficient," Valdez Did Not Exhaust Its Administrative Remedies. 44

IV. VALDEZ'S APPEAL OF RCA RULINGS ARE NOT MOOT 45

V. EVEN IF THE CONSOLIDATED APPEALS ARE MOOT, EXCEPTIONS TO MOOTNESS ARE APPLICABLE IN THIS CASE 56

A. The Public Interest Exception to Mootness Is Applicable in this Case. 56

1. Whether the Disputed Issues Are Capable of Repetition. 58

2. Whether the Mootness Doctrine, if Applied, May Repeatedly Circumvent Review of the Issue. 59

3. Whether the Issues Presented Are So Important to the Public Interest as to Justify Overriding the Mootness Doctrine. 60

B. The Collateral Consequences Doctrine Is Applicable to Defeat Mootness. 62

VI. BPPA AND HARVEST ALASKA ACTED AT THEIR OWN PERIL BY CLOSING THE TRANSFER TRANSACTION WHILE THE ORDER 6 APPEAL WAS PENDING AND BEFORE THE ORDER 17 APPEAL PERIOD HAD RUN 63

CONCLUSION 64

TABLE OF AUTHORITIES

Cases **Page**

Basey v. State, Dep't of Public Safety,
462 P.3d 529 (Alaska 2020)..... 54

Broeckel v. State, Dep't of Corrections,
941 P.2d 893 (Alaska 1997)..... 14

Bruns v. Municipality of Anchorage, Anchorage Water & Waste Water Utility,
32 P.3d 362, 371 (Alaska 2001..... 39

Doe v. State,
487 P.2d 47 (Alaska 1971)..... 56

Etheredge v. Bradley,
502 P.2d 146 (Alaska 1972)..... 56

City of Fairbanks v. Alaska Public Utilities Commission,
611 P.2d 493 (1980).....

Del Monte Fresh Produce Co. v. U.S.,
570 F.3d 316 (DC Cir. 2009) 15

E.J. v. State,
471 P.2d 367 (Alaska 1970)..... 62

Graham v. State,
633 P.2d 211 (Alaska 1981)..... 62

Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks,
48 P.3d 1165 (Alaska 2002)..... 22, 45, 50

Friends of Willow Lake, Inc. v. State DOT,
280 P.3d 542, 546 (Alaska 2012)..... 49

Fuller v. City of Homer,
75 P.3d 1059 (Alaska 2003)..... 54

Gwich'in Steering Comm. v. State, Office of the Governor,
10 P.3d 572 (Alaska 2000)..... 54

Hays v. Charney,
693 P.2d 831 (Alaska 1985)..... 56

TABLE OF AUTHORITIES

Cases **Page**

In Re Joan K,
273 P.2d 594 (Alaska 2012)..... 62

Jones v. Jennings,
788 P.2d 732 (Alaska 1990)..... 54

City of Kenai v. APUC (Kenai),
736 P.2d 760 (Alaska 1987) (Kenai) 2, 13, 23, 24

City of Kenai v. Kenai Peninsula Newspapers, Inc.,
642 P.2d 1316 (Alaska 1982)..... 54, 61

Ketchikan Retail Liquor Dealers Association v. State, Alcoholic Beverage Control Board,
602 P.2d 434 (Alaska 1979)..... 24

Martin v. Dieringer,
108 P.3d 234 (Alaska 2005)..... 62

Municipality of Anchorage v. Anchorage Daily News,
794 P.2d 584 (Alaska 1990)..... 56

Pan Am. World Airways, Inc. v. United States,
371 U.S. 296 (1963) 22

Peter A. v State,
146 P.3d 991 (Alaska 2006)..... 62

Standard Alaska Prod. Co. v. State, Dep't of Revenue,
773 P.2d 201 (Alaska 1989) 39

State, Dep't of Revenue v. Andrade,
23 P.3d 58 (Alaska 2001)..... 14

State v. American Civil Liberties Union,
204 P.3d 364 (Alaska 2009)..... 14

TABLE OF AUTHORITIES

Statutes

AS 40.25.110(a) 54, 60
AS 42.06.140 (General powers and duties) 22
AS 42.06.245 (Federally regulated carriers) 22
AS 42.06.250 (Application) 23
AS 42.06.260 (Public hearings) 48
AS 42.06.270(a) (Grant or denial of application) 5
AS 42.06.290 (Abandonment; discontinuance, and suspension of service) 23
AS 42.06.300 (Modification, suspension, or revocation of certificates) 48
AS 42.06.305 (Transfer of operating authority) 5, 23, 49
AS 42.06.445(a), (c) & (d) (Public records) ..... *passim*
AS 44.62.640(b)(4) (Definition "state agency") 24

Regulations/ Codes

3 AAC 48.045 (Procedure to classify records as confidential) 5, 7, 8, 52
3 AAC 48.049 (Access to confidential records) 43, 44
3 AAC 48.110 (Intervention) 23, 28, 34, 35
3 AAC 48.150 (Hearings) 32
3 AAC 48.151(Order of hearing) 32
3 AAC 48.153 (Prefiled testimony) 32
3 AAC 48.154 (Evidence and exhibits) 32
3 AAC 48.155 (Rights and obligations of parties) 32
3 AAC 48.156 (Hearing record) 32
3 AAC 48.625(a)(7)(B) (Pipeline carrier application) 5, 28
3 AAC 48.654 (Contested applications) 36, 37

Texts

35B C.J.S. Federal Civil Procedure § 777 49

TABLE OF ACRONYMS AND ABBREVIATIONS

Acronym or Abbreviation	Description
ANS	Alaska North Slope
Appellant	City of Valdez
Applicants	BPPA and Harvest Alaska
Application for Transfer	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 [R.000001]
APUC	Alaska Public Utilities Commission, predecessor agency to the RCA
BLM	Bureau of Land Management
BP Entities	BPPA and BPCNA
BPCNA	BPPA affiliate BP Corporation North America Inc.
BPPA	BP Pipelines (Alaska) Inc.
Commission	Regulatory Commission of Alaska
CPCN or certificate	Certificate of Public Convenience and Necessity
Dismissal Order	Order Granting Appellees' Motions to Dismiss, August 10, 2021 [Exc. 308]
FERC	Federal Energy Regulatory Commission
Financial Statements	Applicants' certain financial statements filed as confidential, including audited financial statements of HEI, HEC, and BPCNA
Harvest Alaska	Harvest Alaska, LLC
Harvest Midstream	Harvest Midstream I, L.P.
HEC	Hilcorp Energy Company
HEI	Hilcorp Energy I, L.P.
Hilcorp	Hilcorp Alaska, LLC

TABLE OF ACRONYMS AND ABBREVIATIONS

Acronym or Abbreviation	Description
Hilcorp Entities	Harvest Alaska, Hilcorp, Harvest Midstream, HEI and HEC
Motions to Dismiss	RCA and Hilcorp Entities filed motions to dismiss Valdez's Order 6 and Order 17 appeals, May 14, 2021 [Exc. 229, 236]
Order 5	RCA Order P-19-015(5)/P-19-016(5)/P-19-017(5): Order Granting Petition for Confidential Treatment of Purchase and Sale Agreement, Extending Deadline to Rule on Petitions for Confidential Treatment of Financial Statements and Motions for Waiver, and Requiring Filing, Feb, 20, 2020 [Exc. 80]
Order 5 Comments	Valdez's Comments Re: Order 5, Mar. 4, 2020 [Exc. 100]
Order 6	Order P-19-017(6): Order Granting Motions for Waiver; Denying Motion to Strike and Motion for Expedited Consideration; Declaring Financial Statements Confidential Under AS 42.06.445(c); Finding Request for Confidential Treatment of Financial Statements Under 3 AAC 48.045 Moot; and Addressing Timeline for Decision, Mar. 12, 2020 [Exc. 112]
Order 7	RCA Order P-19-015(7)/P-19-016(7)/P-19-017(7): Order Granting Motions for Waiver; Denying Motion to Strike and Motion for Expedited Consideration; Declaring Financial Statements Confidential Under AS 42.06.445(c); Finding Request for Confidential Treatment of Financial Statements Under 3 AAC 48.045 Moot; and Addressing Timeline for Decision [R. 000747]
Order 11	RCA Order P-19-015(11)/P-19-016(11)/P-19-017(11): Order Addressing Confidentiality of Responses to Commission Questions, Jul. 2, 2020 [R. 003773]
Order 13	RCA Order P-19-015(13)/P-19-016(13)/P-19-017(13): Order Granting Confidential Treatment of Certain Compliance Filings, Aug. 6, 2020 [R. 004241]
Order 14	RCA Order P-19-015(14)/P-19-016(14)/P-19-017(14): Order Granting Confidential Treatment of Financial Information Submitted with Federal and State Right-Of-Way Transfer Applications, Aug. 27, 2020 [R. 004253]
Order 15	RCA Order P-19-015(15)/P-19-016(15)/P-19-017(15): Order Requiring Filings, Sept. 4, 2020 [Exc. 200]
Order 17	RCA Order P-19-015(17)/P-19-016(17)/ P-19-017(17): Order Granting Applications Subject to Conditions, Accepting Guaranties with Modifications, Requiring Filings, and Approving Transfer of Operating Authority Effective on the Date of Closing of the Midstream Transaction, Dec. 14, 2020. [R. 004353]

TABLE OF ACRONYMS AND ABBREVIATIONS

Acronym or Abbreviation	Description
PSA	Purchase and Sale Agreement [among the Applicants]
RCA	Regulatory Commission of Alaska
SPCS	State Pipeline Coordinator Services
TAPS	Trans Alaska Pipeline System
Valdez	Appellant City of Valdez
Valdez's Opposition	Valdez's Opposition to Motions to Dismiss, filed May 24, 2021 [Exc. 262]
VMT	Valdez Marine Terminal
Written Comments	The City of Valdez's Comments, Dec. 13, 2019 [Exc. 20]

PROVISIONS PRINCIPALLY RELIED UPON

Alaska Statutes

§ 42.06.250. Application.

Application for a certificate shall be made in writing to the commission, verified under oath. The commission, by regulation, shall establish the requirements for the form of the application, and the information to be contained in it. Notice of the application shall be served upon the interested parties in the manner that the commission by regulation requires.

§ 42.06.260. Public hearings.

At least 30 days before issuing a certificate of convenience and necessity, the commission shall hold a public hearing on the application. Copies of the completed application shall be made available to the public at least 10 days before the public bearing date. A transcript of the public hearing shall be included in the permanent record of agency action on that application, and copies of the public hearing transcripts shall be available to the public. The commission may, without notice of hearing and pending the determination of an application for a certificate, issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

§ 42.06.300. Modification, suspension, or revocation of certificates

Upon complaint or upon its own motion the commission, after due notice and hearing and for good cause shown, may amend, modify, suspend, or revoke a certificate, in whole or in part. Good cause for amendment, modification, suspension, or revocation of a certificate shall be

(1) the requirements of public convenience and necessity;

(2) misrepresentation of a material fact in obtaining the certificate;

(3) unauthorized discontinuance or abandonment of all or part of a service that is the subject of the certificate;

(4) wilful failure to comply with the provisions of this chapter or the regulations or orders of the commission; or

(5) wilful failure to comply with a term, condition, or limitation of the certificate.

PROVISIONS PRINCIPALLY RELIED UPON

Alaska Statutes (cont.)

§ 42.06.290. Abandonment; discontinuance, and suspension of service

(a) A pipeline carrier may not abandon or permanently discontinue use of all or any portion of a pipeline or abandon or discontinue any service rendered by means of a pipeline that is the subject of a certificate of convenience and necessity, without the permission and approval of the commission, after due notice and hearing, and a finding by the commission that continued service is not required by public convenience and necessity. Any interested person may file with the commission a protest or memorandum of opposition to or in support of discontinuance or abandonment. The commission may authorize temporary suspension of a service or of part of a service.

(b) Upon complaint or upon its own motion, the commission may reinvestigate a previously authorized discontinuance, abandonment, or suspension of a service described in (a) of this section. If, after due notice and hearing, the commission finds that the public convenience and necessity requires the service to be resumed, and that there has not been detrimental reliance on the previous authorization, it may order the operator or owner of the oil or gas pipeline facility to again provide the service.

§ 42.06.305. Transfer of operating authority

(a) Operating authority may not be transferred by sale or lease of the certificate or by the sale of substantially all of the stock or assets of a pipeline carrier holding a certificate without the prior approval of the commission. A transfer not involving a substantial change in ownership shall be summarily approved.

(b) The commission's decision under this section shall be based on the best interest of the public.

Regulations

3 AAC 48.049. Access to confidential records.

(a) A confidential record will not be made public or furnished to any person other than to the commission, its advisory staff, its consultants, and other authorized representatives, except under a subpoena duces tecum or as provided under (b) - (h) of this section.

(b) A person may file a written motion requesting access to a record that the commission has designated as confidential. The motion must identify as specifically as possible the record to which access is sought and must set out the reasons access is sought.

Regulations (cont.)

(c) The person filing the motion described in (a) of this section shall serve the person with confidentiality interests in the record with a copy of the motion. Within 15 days following service of the motion, the person with confidentiality interests in the record may submit its response.

(d) The commission will, at the earliest possible time, issue its determination to grant or deny the motion requesting access, as follows:

(1) if the commission determines that the record should be made public, the commission will notify the person filing the motion and the person with confidentiality interests in the record of the commission's intent to release the record;

(2) within seven days following service of the notice of the commission's intent to release, the person with confidentiality interests in the record may petition for reconsideration or for withdrawal of the record;

(3) if neither reconsideration nor withdrawal of the record is requested, the record becomes public at the end of the seven-day period prescribed in (2) of this subsection;

(4) if reconsideration or withdrawal of the record is requested under (2) of this subsection and the request is denied, the commission will notify the person with confidentiality interest in the record and the person filing the motion for access and the record becomes public on the date set out in the commission's order denying reconsideration or withdrawal;

(5) if a petition for reconsideration or for withdrawal of the record is granted, the commission will issue an order that reclassifies the record as confidential or restricts access to it.

(e) Disclosure of a record covered by a protective order of the commission or the court that prescribes procedures for disclosure other than those contained in this section will be governed by the terms of the order rather than by this section.

(f) A record designated as confidential by order of the commission and entered into evidence in an adjudicatory matter will be disclosed to the parties in the matter under a protective order unless this requirement is waived by the person with confidentiality interests in the record. Examination of the confidential record will be conducted by the commission in camera, and the portions of the record that are confidential will be placed under seal by the commission.

(g) If a party intends to enter as evidence a record designated as confidential under 3 AAC 48.040(b)(5) or (b)(10), that party shall provide the person with confidentiality interests in the record at least five days' notice of that party's intent. Unless within five days after service of that notice the person with confidentiality interests in the record files a petition for confidential status of the record under 3 AAC 48.045(a), the record becomes public when presented to the commission.

(h) If the confidential record to which access is sought is in the possession of a consultant employed by the commission and if access is granted, the person who requests the record will, in the commission's discretion, be required to reimburse the consultant directly for costs incurred in producing the record.

3 AAC 48.110. Intervention.

(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. Any person who has a statutory right to be made a party to that proceeding will be permitted to intervene. Any person whose intervention will be conducive to the ends of justice and will not unduly delay the conduct of the proceeding will, in the commission's discretion, be permitted to intervene. The commission does not grant formal intervention, as such, in nonhearing matters, and any interested person may file documents authorized under 3 AAC 48.010 - 3 AAC 48.170 without first obtaining permission.

(b) In passing upon a petition to intervene, the following factors, among others, will be considered:

(1) the nature of the petitioner's right under statute to be made a party to the proceeding;

(2) the nature and extent of the property, financial, or other interest of the petitioner;

(3) the effect on petitioner's interest of the order which may be entered in the proceeding;

(4) the availability of other means by which the petitioner's interest may be protected;

(5) the extent to which petitioner's interest will be represented by existing parties;

(6) the extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record, including the issues that petitioner intends to address in the proceeding; and

(7) the extent to which participation of the petitioner will broaden the issue or delay the proceeding.

(c) A person wishing to intervene in a proceeding shall file a petition in conformity with 3 AAC 48.090 - 3 AAC 48.100 setting out the facts and reasons why that person should be granted permission to intervene. The petition should make specific reference to the factors set out in (b) of this section.

(d) Unless otherwise ordered by the commission, a petition for permission to intervene must be filed with the commission before the first prehearing conference or, if no conference is to be held, not later than 30 days before the hearing. A petition for permission to intervene which is not timely filed will be dismissed unless the petitioner clearly shows good cause for failure to file that petition on time.

(e) A party to a proceeding may file an answer to a petition to intervene, making specific reference to the factors set out in (b) of this section, within seven days after the petition is filed.

(f) The decision granting, denying, or otherwise ruling on any petition to intervene will, in the commission's discretion, be issued without receiving testimony or oral argument either from the petitioner or other parties to the proceeding.

(g) A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision granting leave to intervene may be deemed to constitute an expression by the commission that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order.

3 AAC 48.654. Contested applications.

(a) Before the close of the comment period, an interested person may file with the commission comments or a protest of the application under 3 AAC 48.100.

(b) A protest of an application must include

(1) specific grounds for the protest, including a listing of facts in dispute;

(2) any steps the applicant may take to mitigate the protest;

(3) any conditions the commission should consider applying to the application if approved; and

(4) a petition to intervene under 3 AAC 48.110.

Regulations (cont.)

(c) If a filing does not contain the information required in (b) of this section, the commission will consider the filing to be comments.

(d) An applicant wishing to file a response to the protest must file that response with the commission within the 10 days after the close of the comment period.

(e) The commission will issue an order indicating whether there will be a hearing on the application within 15 days after the filing of the applicant's response to the protest.

JURISDICTIONAL STATEMENT

The superior court entered its final Order Granting Appellees' Motions to Dismiss on August 10, 2021 (Dismissal Order) [Exc. 308]. On September 9, 2021, Appellant, the City of Valdez (Valdez or Appellant) timely filed herein its Notice of Appeal of the Dismissal Order. This Court has jurisdiction over this appeal pursuant to AS 22.05.010.

STATEMENT OF THE ISSUES

1. The superior court erred in dismissing Valdez's appeals from Regulatory Commission of Alaska (RCA or Commission) Orders 6 and 17.[1]

2. The superior court erred in holding Valdez does not have standing to appeal Order 17.

3. The superior court erred in holding the questions raised in the appeals from Order 17 and Order 6 are moot.

4. The superior court erred in holding Valdez failed to exhaust its administrative remedies.

5. The superior court erred in holding Valdez's Motion for Submission of Complete Record on Appeal and Entry of a Protective Order is moot.

6. The superior court erred by failing to consider the constitutional and statutory issues raised by Valdez.

---

[1] RCA Orders P-19-017(6), Mar. 12, 2020 (Order 6) [Exc. 747], and P-10-017(17), Dec. 14, 2020 (Order 17) [Exc. 214]. Order 17 and certain other documents in the record on appeal had lost headers or footers and have been replaced in the Appellant's Excerpt with the official versions from the RCA website.

7. The superior court erred by failing to consider the constitutional law exception to exhaustion.

8. The superior court erred by failing to consider whether exhaustion of administrative remedies was required.

9. The superior court erred by failing to independently analyze the public records requirements under AS 42.06.445, the Alaska Public Records Act, and the Alaska Constitution.

10. The superior court erred by failing to consider this Court's precedent in *City of Kenai v. APUC*, 736 P.2d 760, 761 (Alaska 1987) (*Kenai*), in determining whether Appellant has standing to appeal Order 17.

11. The superior court erred in concluding that Appellant did not sufficiently participate in RCA Docket P-19-017 to establish standing to appeal Order 17.

12. The superior court erred in concluding that Appellant was not factually aggrieved by the issuance of Order 17 to establish standing to appeal Order 17.

13. The superior court erred in concluding that Appellant did not request a hearing or seek to uncover the confidential documents.

14. The superior court erred in its analysis of the Applicants'[2] provision of documents to the RCA as neither Appellant nor the Court knows the extent of the documents filed in response to requirements of the RCA since the majority of the

---

[2] The Applicants were BP Pipelines (Alaska) Inc. (BPPA) and Harvest Alaska, LLC (Harvest Alaska).

documents filed by BPPA and Harvest were held to be confidential, not made available to the public, and not even included in the record on appeal.

15. The superior court erred in its conclusions regarding Valdez's contribution to the RCA Docket.

16. The superior court erred in its conclusions regarding the closure of the Applicants' transaction.

17. The superior court erred in concluding that the RCA "held a public hearing."

18. The superior court erred in concluding that the RCA did all that it was required to do and that the RCA exceeded its statutory obligations.

19. The superior court erred in concluding the relief sought by Appellant would not have any bearing on the overall transaction in Docket P-19-017.

20. The superior court erred in concluding and holding that the only possible remedy available to Appellant in the underlying appeal to the superior court would be a declaration that the confidentiality rulings made in Order 6 were invalid.

21. The superior court erred in its conclusions regarding the RCA's Order 6 ruling and that holding Order 6 invalid would be without any practical effect.

22. The superior court erred in its conclusion that since Valdez did not seek to stay the RCA proceeding or the enforcement of Order 17, the Order 6 confidentiality rulings no longer impact the rights of Valdez or the public.

STATEMENT OF THE CASE

1. Trans Alaska Pipeline System. The Trans Alaska Pipeline System (TAPS) is an 800-mile, 48-inch pipeline that transports Alaska North Slope (ANS) crude oil from

Pump Station No. 1 on the North Slope of Alaska to the Valdez Marine Terminal (VMT) on the southern shore of the Port of Valdez.[3] TAPS cost over $8 billion to build in the 1970s, was the largest privately funded construction project in the world at the time, and it remains to this day an engineering marvel.[4] It crosses three major mountain ranges and roughly 500 streams and rivers traversing Alaska.[5] To date, over 18 billion barrels of ANS crude oil have been transported through TAPS.[6]

The VMT occupies approximately 1,000 acres within the City of Valdez on the southern shore of Port Valdez.[7] The VMT currently has two tanker loading berths with 14 storage tanks, having a working inventory capacity of 6.6 million barrels of ANS crude oil, used for the loading crude oil tankers for shipment to refineries throughout the West Coast and Pacific Rim.[8]

2. RCA Process and Decision. In RCA Docket P-19-017, the Applicants requested approval of the transfer from BPPA to Harvest of BPPA's entire interest in TAPS, including Certificate of Public Convenience and Necessity (CPCN) No. 311 and all operating authority thereunder.[9]

---

3 https://www.alyeska-pipe.com/taps-facts/
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 Joint Application for Approval of Transfer of CPCN No. 311, and Operating Authority Thereunder from BPPA to Harvest Alaska, filed in RCA Docket P-19-017 on Sept. 27, 2019 (Application for Transfer) [R.000001-61].

Under 3 AAC 48.625(a)(7)(B), the Applicants were required to file their "most recent audited financial statements for the two most recent fiscal years preceding the date of the Application for Transfer." Such financial statement filing requirements are consistent with Applicants' obligation to demonstrate that their Application for Transfer is in the best interest of the public under AS 42.06.305(b). As part of such showing, Applicants are required to demonstrate that Harvest is "able and willing" to undertake the duties and responsibilities under CPCN No. 311, including the proposed transferee's financial fitness.[10]

In response to this requirement, Harvest Alaska and its affiliates, Hilcorp Alaska, LLC (Hilcorp) and Harvest Midstream I, L.P. (Harvest Midstream), filed certain financial statements as confidential (collectively, Financial Statements), along with a petition under AS 42.06.445(d) and 3 AAC 48.045 for the confidential treatment of the Harvest Financial Statements, as more specifically identified in that petition.[11]

On November 14, 2019, the RCA issued a public notice establishing December 13, 2019, as the deadline to file written comments on the Application for Transfer and on the above-referenced petition for confidential treatment of financial statements.[12] On

---

[10] AS 42.06.270(a); RCA Order P-11-015(2), Dec. 9, 2011 ("In determining whether an applicant is able and willing, we consider the applicant's technical and managerial expertise as well as its financial fitness."). Link: RCA Pleading Paper (alaska.gov)

[11] Harvest Alaska, Hilcorp, and Harvest Midstream's Petition for Confidential Treatment of Financial Statements, filed in RCA Docket P-19-017 on Sept. 27, 2019 [Exc. 1]. That filing did not assert AS 42.06.445(c) as a ground for requested confidential treatment.

[12] Second Supplemental Notice of Pipeline Applications, Nov. 14, 2019 [Exc. 16-17].

December 13, 2019, Valdez filed such written comments,[13] more specifically discussed below.[14]

On January 28, 2020, the RCA issued an order scheduling a public input hearing, pursuant to which the RCA invited the public to provide oral comments limited to three minutes to the RCA on February 4, 2020, regarding the Application for Transfer.[15] Valdez attended the public input hearing and provided oral comments through its counsel, Robin Brena.[16]

On December 12, 2019, the RCA required the filing of additional information and documents by Applicants, including additional financial information and the purchase and sale agreement (PSA) governing the proposed transfer transaction.[17] On December 23, 2019, Applicants responded to the RCA's request, including the filing of audited financial statements for Harvest Alaska's affiliates Hilcorp Energy I, L.P. (HEI) and Hilcorp Energy Company (HEC) and for BPPA affiliate BP Corporation North America Inc. (BPCNA) (such additional financial statements are included within the meaning of Financial Statements as used herein).[18] Such additional filings were accompanied by additional

---

[13] The City of Valdez's Comments, Dec. 13, 2019 (Written Comments) [Exc. 20].

[14] "Well over 300 comments were received" by the RCA in Docket P-19-017. Order 17 at 16 [Exc. 215].

[15] RCA Order Scheduling Public Input Hearing, P-19-017(4), Jan. 28, 2020, at 4 ("While our future procedures regarding these applications have yet to be resolved, we schedule a public input hearing to allow the opportunity for oral commentary. We believe some additional context may help to facilitate meaningful oral commentary.") (Order 4) [Exc. 55].

[16] Public Input Hearing Tr. at 24-26 [Exc. 70-72].

[17] RCA Order Requiring Filings, P-19-017(2), Dec. 12, 2019 [Exc. 18].

[18] Applicants' Compliance Filing in Response to Order No. 2, Dec. 23, 2019 [R.000495-511].

petitions under AS 42.06.445(d) and 3 AAC 48.045 for confidential treatment of the PSA and Financial Statements that were filed as confidential with the RCA.[19]

Through RCA Order P-19-017(5) (Order 5), the RCA granted Applicants' request for confidentiality of the PSA based upon the balancing test set forth in 3 AAC 48.045(a)-(b)[20] but expressed concern the Financial Statements would not meet the balancing test and required Applicants to file additional information regarding their requests for confidentiality of the Financial Statements.[21] Order 5 also suggested, *sua sponte*, that AS 42.06.445(c) may be applicable to the issue of the confidentiality of the Financial Statements.[22] Prior to the RCA's *sua sponte* invitation to Applicants through Order 5 to request the retroactive application of AS 42.06.445(c) to the Financial Statements, Applicants had not marked the Financial Statements for confidentiality under AS 42.06.445(c) nor had they requested confidential treatment under AS 42.06.445(c).[23] In response to Order 5, the Applicants asserted for the first time that AS 42.06.445(c)

---

[19] HEI and HEC's Petition for Confidential Treatment of Financial Statements, Dec. 23, 2019 [Exc. 39]; BPPA's Petition for Confidential Treatment of Financial Statements, Dec. 23, 2019 [Exc. 29]. These filings did not assert AS 42.06.445(c) as a ground for requested confidential treatment.

[20] Order 5 at 5, 8-9 [Exc. 84, 87-88].

[21] In support of its request for such additional information the RCA stated "[w]e do not believe as strong a case has been made for confidential treatment of the financial statements submitted in the proceeding [as had been made in support of confidential treatment of the PSA], and also note numerous members of the public have expressed an interest in disclosure." Order 5 at 9 [Exc. 88].

[22] Order 5 at 9-12 [Exc. 88-91].

[23] Harvest Alaska, Hilcorp, and Harvest Midstream's Petition for Confidential Treatment of Financial Statements, filed in RCA Docket P-19-017 on Sept. 27, 2019 [Exc. 1]; HEI and HEC's Petition for Confidential Treatment of Financial Statements, Dec. 23, 2019 [Exc. 39]; BPPA's Petition for Confidential Treatment of Financial Statements, Dec. 23, 2019 [Exc. 29].

requires all of the Financial Statements previously filed in Docket P-19-017 be kept confidential.

On March 4, 2020, Valdez filed comments with the RCA regarding Order 5 asserting that the RCA had misinterpreted the meaning of AS 42.06.445(c) and that such statute's exception to the general rule requiring disclosure of the subject Financial Statements was inapplicable to such Financial Statements, thereby ruling out AS 42.06.445(c) as a potential ground to grant confidential status to such documents.[24] In its comments, among other points, Valdez pointed out that such information was necessary for meaningful public comment, publicly available for years before the RCA, and not permitted to be retroactively deemed confidential under the RCA's most recent interpretation of AS 42.06.445(c).[25]

On March 12, 2020, the RCA issued Order 6, which is one of the RCA orders that Valdez appealed to the superior court, therein declaring the Financial Statements confidential under AS 42.06.445(c) and declaring the requests for confidential treatment of these financial statements under 3 AAC 48.045 as moot.[26] In Valdez's appeal of Order 6 to the superior court, Appellant disputes the RCA's interpretation of AS 42.06.445(c) contending that it is inapplicable to the Financial Statements and unconstitutional and, a corollary, that AS 42.06.445(c) is unconstitutional as applied.

---

[24] Valdez's Comments Re: Order 5, Mar. 4, 2020 (Order 5 Comments) [Exc. 100].
[25] *Id.*
[26] Order 6 [Exc. 112].

On April 2, 2020, the RCA requested additional information from the Applicants.[27] On May 4, 2020, the Applicants made a filing responding to the questions posed in Order 7 and providing the requested documents. That filing was accompanied by a petition requesting confidential treatment for some of the submitted filings.[28] On July 2, 2020, the RCA granted Applicant's request for confidential treatment.[29]

On June 12, 2020, the RCA issued Order 9 therein again requesting additional information from the Applicants.[30] On July 7, 2020, the Applicants filed the requested documents and information and requested confidential treatment of certain aspects of the response.[31] On August 6, 2020, the RCA granted Applicants' request for confidential treatment.[32]

RCA Staff also requested certain information from the Applicants, including copies of all federal, state, or private right-of-way applications concerning the transfer of BPPA to Harvest Alaska. On July 28, 2020, the Applicants filed copies of the pipeline right-of-way transfer application for the federal TAPS right-of-way grant (Bureau of Land Management (BLM) Application) and pipeline right-of-way transfer applications for the State TAPS right-of-way lease and for other pipeline right-of-way leases proposed to be

---

[27] Order Requiring Filing, P-19-017(7), dated April 2, 2020 (Order 7) [Exc. 112].
[28] Applicants' Petition for Confidential Treatment of Certain Compliance Filings Submitted Pursuant to Order 7, May 4, 2020 [R.0002283-321].
[29] Order Addressing Confidentiality of Responses to Commission Questions, P-19-017(11), July 2, 2020 (Order 11) [R.003773].
[30] Order Requiring Filing, P-19-017(9), June 12, 2020 (Order 9) [R.003742-50].
[31] Applicants' Compliance Filing in Response to Order No. 9, July 7, 2020 [R.003782-862].
[32] Order Granting Confidential Treatment of Certain Compliance Filings, Order P-19-017(13), Aug. 6, 2020 (Order 13) [R. 004241].

transferred (collectively, State Pipeline Coordinator Services (SPCS) Applications).[33] The Applicants petitioned for confidential treatment of financial statements attached to the BLM and SPCS Applications. On August 27, 2020, the RCA issued Order 14 therein granting confidential status to the financial statements attached to the BLM and SPCS Applications.[34] The documents and information determined under Orders 11, 13, and 14 to be confidential are collectively referred to herein as Additional Information.

On September 4, 2020, Valdez made an Informational Filing Regarding Moody's Recent Downgrading of Hilcorp's Ratings, with the RCA.[35]

On December 14, 2020, the RCA issued Order 17, the second RCA order that is the subject of Valdez's appeal to the superior court, therein granting the Application for Transfer.[36] Through Superior Court Case Number 3AN-21-04104 CI, Valdez appealed Order 17, thereby questioning the propriety of Order 17.

On December 18, 2020, within four days after the issuance of Order 17, BBPA and Harvest Alaska rushed to close the TAPS CPCN transfer transaction, [37] and this unilateral action significantly compromised Valdez's significant efforts to correct errors in the issued

---

[33] Applicants' Notice of Filing of Federal and State Pipeline Right-Of-Way Transfer Applications, July 28, 2020 [R.003930-4157].

[34] Order Granting Confidential Treatment of Financial Information Submitted with Federal and State Right-of-Way Transfer Applications, P-19-017(14), Aug. 27, 2020 (Order 14) [R.004253].

[35] September 4, 2020, Valdez made an Informational Filing Regarding Moody's Recent Downgrading of Hilcorp's Ratings [Exc. 202].

[36] Order 17 [R.0004353].

[37] Order 17 was issued on Dec. 14, 2020, and a Notice of Closing Transaction was filed with the RCA indicating that the transaction closed on Dec. 18, 2020. That Notice was filed on Dec. 21, 2020 [Exc. 227].

Orders 6 and 17, correct the impacts of those orders, and to otherwise enforce Valdez's and other interested parties' and commentators' constitutional and statutory rights, including fundamental rights of free speech and due process.

2. Superior Court Process and Decision. Shortly after Valdez filed its appeal of Order 6, the RCA filed a motion to dismiss the Order 6 appeal, asserting that Order 6 was not yet a final appealable order.[38] Valdez opposed the RCA's motion.[39] Harvest Alaska, Hilcorp, Harvest Midstream, HEI, and HEC (collectively, Hilcorp Entities) and BPPA and BPCNA (collectively, BP Entities) joined in the RCA's motion to dismiss.[40] This first motion to dismiss the Order 6 appeal was denied.[41]

On May 8, 2020, Valdez requested expedited consideration of its Order 6 appeal by the superior court[42] for the purpose of having the Order 6 appeal issues resolved so the public would have an opportunity to provide meaningful public comment *before* the RCA issued its final order on the merits of the Application for Transfer. The RCA opposed expedited consideration,[43] and the Hilcorp Entities and BP Entities joined in that opposition.[44] The superior court denied Valdez's initial motion for expedited consideration

---

[38] Motion to Dismiss, Apr. 30, 2020 [R. 005100].
[39] Appellant's Opposition to Motion to Dismiss, May 8, 2020 [Exc. 136].
[40] Hilcorp's Joinder in RCA's Motion to Dismiss Appeal, May 18, 2020 [Exc. 155]; BPPA and BPCNA's Joinder in Motion to Dismiss Appeal, May 14, 2020 [Exc. 153].
[41] Order Denying Motion to Dismiss, June 22, 2020 [Exc. 168].
[42] Cross-Motion for Expedited Consideration, May 8, 2020 [Exc. 145].
[43] Opposition to Cross-Motion for Expedited Consideration, May 18, 2020 [Exc. 157].
[44] Hilcorp Entities' Joinder in RCA's Opposition to Cross-Motion for Expedited Consideration, May 19, 2020 [Exc. 164]; BP Entities' Joinder in RCA's Opposition to Cross-Motion for Expedited Consideration, May 19, 2020 [Exc. 166].

for lack of authority, [45] notwithstanding the superior court's inherent authority to expedite its own schedule which is routinely done. On July 2, 2020, Valdez filed a Renewed Motion for Expedited Appeal, therein providing considerable authority supporting expedited consideration of the appeal.[46] The RCA again opposed expedited consideration, and the BP Entities and Hilcorp Entities joined in that.[47] On August 4, 2020, the Court issued an order denying Valdez's second attempt to have its Order 6 appeal heard on an expedited basis.[48]

On May 14, 2021, the RCA and Hilcorp Entities filed motions to dismiss Valdez's Order 6 and Order 17 appeals (collectively, Motions to Dismiss). [49] Valdez opposed these dismissal motions,[50] and upon invitation of the superior court,[51] provided a supplemental opposition regarding the topic of mootness.[52] The RCA filed a reply to Valdez's supplemental opposition regarding mootness, and Valdez filed a surreply to the RCA's reply. [53]

---

[45] Order Denying Expedited Consideration, June 23, 2020 [Exc. 172].
[46] Valdez's Renewed Motion for Expedited Consideration of Appeal, July 2, 2020 [Exc. 176].
[47] Opposition to Renewed Motion for Expedited Consideration, July 9, 2020 [Exc. 185]; BP Entities' Joinder in RCA's Opposition to Renewed Motion for Expedited Consideration July 9, 2020 [Exc. 190].
[48] Order Denying Renewed Motion for Expedited Consideration, Aug. 4, 2020 [Exc. 192].
[49] RCA's Motion to Dismiss, May 14, 2021 [Exc. 229]; Hilcorp Entities' Motion for Dismissal of Appeal, May 14, 2021[Exc. 236].
[50] City of Valdez's Opposition to Motions to Dismiss, May 24, 2021 [Exc. 262].
[51] Order Inviting Further Briefing, June 15, 2021 [Exc. 287].
[52] City of Valdez's Supplemental Opposition to Motions to Dismiss, June 23, 2021 [Exc. 289].
[53] Reply in Support of Motion to Dismiss-Mootness, July 6, 2021 [Exc. 296]; City of Valdez's Motion to Surreply and Surreply to RCA's Reply in Support of Motion to Dismiss-Mootness, July 7, 2021 [Exc. 304].

On August 10, 2021 the superior court issued its Order Granting Appellees' Motions to Dismiss,[54] which order is the subject of this appeal. Valdez asked the Court to reconsider the Dismissal Order, and that request was denied.[55]

STANDARD OF REVIEW

The superior court erred in concluding that (1) Valdez did not have standing to appeal Order 17, (2) Valdez did not exhaust administrative remedies before the RCA, and (3) the matters before it were moot. The following standards of review are applicable to these issue areas.

1. Standing. In *Kenai*, in which this Court granted the City of Kenai standing to appeal an Alaska Public Utilities Commission (APUC) decision (discussed in more detail below), the Court held that "[w]hether a party has standing to seek judicial review of an agency's decision following an evidentiary hearing, either by appeal or in a declaratory judgment action, is a question of law, reviewable *de novo.*" When applying the *de novo* standard of review, the Court applies its independent judgment to questions of law, adopting the rule of law most persuasive in light of precedent, reason, and policy.[56] *Kenai's* standard of review determination with respect to standing is applicable in this case, and

[54] Dismissal Order [Exc. 308].
[55] Valdez's Motion for Reconsideration of Dismissal Order, Aug. 23, 2021 [Exc. 323]; Order Denying Appellant's Motion for Reconsideration of Order Granting Appellee's Motion to Dismiss, Aug. 25, 2021 [Exc. 367].
[56] *Bush v. Elkins*, 342 P.3d 1245 at 1251 (Alaska 2015).

whether Valdez had standing to seek review of Order 17 by the superior court requires *de novo* review.

2. Exhaustion of Administrative Remedies. In *State, Dep't. of Revenue v. Andrade*, 23 P.3d 58, 65 (Alaska 2001), this Court held that,

> We review for abuse of discretion a superior court's decision regarding whether a party has exhausted the administrative remedies available or whether that party's failure to exhaust remedies should be excused.[57] However, "the court's determination whether the doctrine of exhaustion of administrative remedies applies to a particular action is a question of law, which we review *de novo.*"[58]

In the context of this case and based upon the foregoing, in determining whether the doctrine of the exhaustion of administrative remedies applies to Valdez, *de novo* review applies. If it is determined that exhaustion of administrative remedies applies to Valdez, the abuse of discretion standard is applied to determine whether Valdez exhausted the administrative remedies available or whether Valdez's failure to exhaust remedies should be excused.

3. Mootness. This Court reviews issues relating to mootness, *de novo*.[59]

---

[57] Citing *State v. Beard*, 960 P.2d 1, 5 (Alaska 1998); *Broeckel v. State, Dep't of Corrections*, 941 P.2d 893, 896 n.2 (Alaska 1997).

[58] Citing *State, Dep't of Transp. and Pub. Facilities v. Fairbanks North Star Borough*, 936 P.2d 1259, 1260 n. 3 (Alaska 1997) (*FNSB*).

[59] *Regulatory Commission of Alaska v. Matanuska Electric Assn., Inc.*, 436 P.3d 1015, 1027 (Alaska 2019) ("[I]n Alaska the mootness doctrine "is a matter of judicial policy" and, unlike its federal counterpart, does not act as a limit on jurisdiction. The court had the *jurisdiction* to hear an appeal from the line loss docket even if that appeal could have been properly dismissed as moot. We therefore consider the superior court's decision to rule on the issue of the RCA's authority in the consolidated cases not as an assertion of appellate jurisdiction but as a prudential decision, implicating issues of ripeness and mootness that we review de novo." (Citing to *Alaska Cmty. Action on Toxics v. Hartig*, 321 P.3d 360, 366 (Alaska 2014); *see also State v. Am. Civil Liberties Union*, 204 P.3d 364, 367-68 (Alaska

ARGUMENT

I. SUMMARY OF ARGUMENT

At the core of our democracy are the foundational constitutional and statutory rights to access public documents necessary to meaningfully understand, review, and engage in government actions impacting our lives. In the underlying proceeding before the RCA, Applicants sought to transfer the largest ownership interest and operating authority in TAPS to a privately held company. To meet the statutory requirements for approval, Applicants are required to demonstrate they are fit, willing, and able to operate TAPS. Through this appeal, Valdez is ultimately seeking (1) access to the core financial documents held secret by the RCA that underlie the RCA's regulation of TAPS and Applicants' assertion that they are and continue to be fit, willing, and able to operate TAPS, (2) the opportunity to provide meaningful comments on such financial documents in an effort to shape the ongoing regulatory conditions imposed on the CPCN holder to ensure TAPS is regulated in the public interest consistent with the terms of the Alaska Pipeline Act, and (3) an evidentiary hearing among interested parties as required by law before such a transaction may be approved or a CPCN may be modified or amended. The RCA has refused to provide these fundamental rights to Valdez and all Alaskans, and the superior court, based on standing, exhaustion of administrative remedies, and mootness arguments,

---

2009) *("[T]his court is the ultimate arbiter of . . . issues [of standing, mootness,* and ripeness] and we review de novo a superior court's ripeness determination.") (emphasis added). *See also, Del Monte Fresh Produce Co. v. U.S.*, 570 F.3d 316, 321 (DC Cir. 2009) ("Del Monte appeals the dismissal of its amended complaint on the principal ground that the claim for relief falls within the capable of repetition but evading review exception to the mootness doctrine. Our review is *de novo.*").

has refused to substantively consider whether the RCA's denial of these substantive rights is proper.

Before this Court are matters of great pubic significance. TAPS is the most important crude oil pipeline system in the history of Alaska. The vast majority of the oil wealth now funding Alaska's Permanent Fund Dividends, university system, and government services has been and is continuing to be transported to market through TAPS. Literally, hundreds of Alaskans attempted to meaningfully participate in the underlying proceeding.

The transfer of the largest ownership interest in TAPS to a privately held company based on financial documents held secret from the public by the RCA denies Valdez and all Alaskans the opportunity to meaningfully comment or engage in RCA's administrative action. The RCA's interpretation of AS 42.06.445(c) used to keep these basic Financial Statements secret from the public is an unconstitutional interpretation so extreme it eliminates the rights of all Alaskans to review virtually every public document relating to the state regulation of pipelines in Alaska as well as the rights of our courts to meaningfully judicially review the final orders of the RCA relating to those pipelines. The RCA also acted, for the first time in its regulatory history and after having specifically rejected such an approach in the past as inconsistent with the Alaska Pipeline Act, to modify and amend CPCN No. 311 to eliminate the existing $2.5 billion of dismantling, removal, and restoration (DR&R) obligations and similar refund obligations for the new CPCN holder.[60]

---

[60] This RCA novel approach bifurcates DR&R obligations and does not obligate the current CPCN holder to undertake any prior DR&R, but leaves the prior CPCN holder's

The RCA took these unparalleled regulatory actions without identifying or permitting interested parties to intervene in the underlying proceeding, and without holding a public hearing. No Alaskan who has lived through the consequences of the *Exxon Valdez* oil spill may doubt whether Valdez, and all Alaskans, should have access to the core financial information necessary to meaningfully comment on whether TAPS is being operated by owners who are fit, willing, and able to safely operate TAPS. No Alaskan who understands that almost $2.5 billion of DR&R obligations and similar refund obligations have been stripped from CPCN No. 311 may doubt the need for a public hearing involving interested parties prior to such an action. No court that has a legal obligation to judicially review the basis for the RCA's final orders may doubt the value of having a final order with factual findings based on an evidentiary record before the court and legal holdings based upon existing law. The RCA is not a kingdom apart from our constitution, the terms of the Alaska Pipeline Act, the rights of all Alaskans, and the rights of our courts to judicially review the RCA's final orders. Instead, the RCA is merely a regulatory agency that has been charged with regulating TAPS and our other oil pipelines in the public interest under the terms of the Alaska Pipeline Act and consistent with the constitutional rights of all Alaskans and our courts to judicially review its final orders.

---

guarantors, having no remaining presence in Alaska, responsible for $2.5 billion in past DR&R obligations. It is not clear whether such an approach is practically viable or whether the RCA has the necessary regulatory authority to agree to such contractual arrangements over nonregulated entities while permitting the regulated entities to avoid those same obligations. It would be difficult to find a regulatory set of circumstances that would benefit more from a public hearing involving interested parties.

Through Order 17, the RCA has failed to (1) permit Valdez as a member of the public to review the core financial information concerning the applicant's financial fitness to safely operate TAPS within Valdez's city boundaries and provide meaningful public comment on both the transfer of operating authority and the ongoing operation of TAPS; (2) permit Valdez as an interested party to intervene in the public evidentiary hearing that is required by law under the circumstances of this case to factually and legally determine the Applicants' financial fitness and responsibilities under the certificate and to modify and amend the certificate; (3) consider conditions to transparently protect the public interest if such conditions are merited; (4) issue a final order with factual findings based on an evidentiary record and legal holdings based on legal precedent rationally revealed in its final order and susceptible to judicial review.[61]

The superior court found Valdez lacked standing and dismissed its substantive claims as moot. Neither action was properly informed or correct. A major reason the superior court questioned Valdez's standing was because Valdez did not move to intervene in the underlying proceeding. In Order 17, the RCA declined Valdez's request for an evidentiary hearing and resolved the application as a routine "nonhearing" matter. At no point prior to Order 17 did the RCA decide to hold an evidentiary hearing or give notice or an opportunity to file a petition to intervene in an evidentiary hearing. Importantly, by

[61] All of these matters are within the ongoing regulatory authority of the RCA to correct on remand. All of these matters will continue to arise with regard to the ongoing operations and transfers of operating authority for TAPS and every other crude oil pipeline in Alaska going forward. None of these matters are moot.

deciding the matter as a nonhearing matter, the RCA *foreclosed* Valdez's opportunity to have a petition for intervention considered or granted.

In ruling that Valdez lacked standing, the superior court failed to understand that the RCA's regulations do not permit intervention unless the RCA holds an evidentiary hearing, which it refused to do in the underlying proceeding. Valdez requested the RCA hold an evidentiary hearing and indicated it would timely intervene were one to be held. Moreover, Valdez appealed the RCA's refusal to hold an evidentiary hearing, through Order 17, as unconstitutional and in violation of statutory and regulatory law. Valdez should have the opportunity to pursue its appeal of the RCA's decision to decide these matters without an evidentiary hearing and to foreclose Valdez's opportunity to file a petition to intervene and participate as a party in the underlying proceeding.

Aside from the superior court's heavy reliance upon Valdez's failure to file a petition to intervene, the superior court also cited a litany of actions that were either not required or would have been legally meaningless or impractical under the circumstances of this case for Valdez to have undertaken in order to have preserved its standing to appeal. Valdez fully availed itself of the limited opportunities provided by the RCA to rationally participate in the underlying proceeding. Notwithstanding Valdez's efforts, the RCA denied Valdez's efforts to have access to basic financial information necessary for informed or meaningful public comment and then denied Valdez's efforts for an evidentiary hearing even though, on the facts of the underlying proceeding, one was legally required.

During the underlying administrative proceedings, the RCA indicated on several occasions that it had not yet decided whether to have an evidentiary hearing. Ultimately, the RCA never publicly disclosed its decision to deny interested persons the right to intervene and participate in an evidentiary hearing prior to Order 17. For that matter, not even Order 17 expressly indicates that the RCA had decided not to hold an evidentiary hearing. Thus, the RCA (1) kept Valdez and the rest of the public in the dark during the public comment period by asserting the key documents necessary for meaningful public comments were confidential as AS 42.06.445(c) documents, (2) denied Valdez and all interested persons the opportunity to meaningfully participate in the substantive issues raised by refusing to hold an evidentiary hearing despite several contested factual issues, and (3) issued Order 17 based on a record secret to everyone but itself and the Applicants, and without citing to any substantive record support for its substantive factual findings and legal holdings on key issues. The RCA essentially held a hearing with itself based on a secret record and foreclosed any substantive or meaningful participation by the public or by any person interested in participating as an intervening party. Such actions by a regulatory agency are well below the constitutional and statutory standards set for an agency conducting the public's affairs. There was nothing further of merit Valdez could have done to be heard.

Importantly, the superior court's Dismissal Order, if permitted to stand, will permit the RCA's erroneous interpretation of AS 42.06.445(c) to stand as valid RCA case law without a reasonable opportunity to seek judicial redress. That is, unless this Court rules otherwise, the RCA may continue to selectively deny the public access to virtually any

document filed concerning the state regulation of crude oil pipelines in Alaska. Furthermore, unless this Court rules otherwise, the RCA is likely to continue to violate the public's fundamental right to meaningfully participate in the public process and discourage those who might otherwise be interested in matters before the Commission from seeking opportunities to so participate.

Valdez's appeals are not moot because several present, live controversies continue to exist, even after the commercial closing of the transaction. The financial condition of Harvest Alaska continues to be of important public interest, now more than ever, given that the TAPS CPCN has been transferred to Harvest Alaska. Not only do Valdez and other Alaskans have the right to know the financial wherewithal of those involved in the subject transaction (including that of Harvest Alaska and its affiliates), but Valdez and other Alaskans have the right to know the continuing financial ability of these entities to perform their obligations under Order 17 and the Alaska Pipeline Act.[62] Absent a substantive ruling by this Court, every document filed with the RCA concerning its regulation of TAPS and other crude oil pipelines in Alaska may be held secret. Absent a substantive ruling by this Court, the RCA will never consider, much less adopt informed financial and transparency conditions to ensure that the transfer of CPCN No. 311 and future transfers are in the public interest. Absent a substantive ruling by this Court, the RCA may continue to approve the transfer as well as modify and amend CPCN No. 311 and future CPCNs without holding a public hearing with interested parties as required by law.

---

[62] AS 42.06.

This Court has recognized that "[i]n most cases, mootness is found because the party raising an appeal cannot be given the remedy it seeks, even if the court agrees with its legal position."[63] This is not one of those cases.[64] Valdez is not seeking to "undo" the transaction at issue.[65] Rather, Valdez is seeking to clarify the RCA's obligation to permit documents relating to the regulation of TAPS and other pipelines in Alaska to be made public. Valdez is also seeking to clarify and add conditions to the transaction to provide ongoing financial transparency and greater protection of the public interest. Valdez can, in fact, be given the remedy it seeks from this Court.[66] In short, the effect of the Dismissal Order under the facts of this case is simply unreasonable and should not stand.

---

[63] *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2002).

[64] Even if the consolidated appeals were moot, the "public interest exception" and the "collateral consequences doctrine" have been recognized by this Court as exceptions to the application of the mootness doctrine. The facts of this case meet the requirements of each of these exceptions, and they should be applied to avoid dismissal of these appeal proceedings.

[65] *See* Dismissal Order at 13 [Exc. 320]. While Valdez is not asking the Court to undo the transaction, it is important to note that transactions may be undone in whole or in part. As an example of this in the context of antitrust litigation, *see Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 311 (1963) ("The transactions in question are reached by the terms of § 411 [of the Sherman Act]. But more important, the particular relation of this problem to the general process of encouraging development of new fields of air transportation makes it all the more appropriate that the [Civil Aeronautics] Board should decide whether these particular transactions should be undone in whole or in part, or whether they should be allowed to continue."

[66] Under AS 42.06.140, the general powers of the RCA to regulate pipelines in the public interest are very broad and all- encompassing. Under AS 42.06.245, "nothing limits the powers of the commission set out in this chapter except to the extent they are preempted by federal law." Thus, AS 42.06 provides the RCA with significantly greater state regulatory authority over crude oil pipelines than federal law provides the Federal Energy Regulatory Commission (FERC). For example, the Alaska Pipeline Act requires the RCA to regulate the issuance, transfer, and abandonment of a certificate of public convenience and necessity for a crude oil pipeline operating in intrastate commerce such as those that

II. VALDEZ HAS STANDING TO APPEAL ORDER 17

The superior court's position that "Valdez does not have standing to appeal Order 17"[67] ignores and misapplies prevailing Alaska case law on this issue. *Kenai* is directly applicable to the standing issue presented in this case, which involved the standing of the City of Kenai to appeal the ruling of the RCA's predecessor agency, the APUC.[68] In *Kenai,* the City of Kenai did not file a protest but, like Valdez, utilized other means to express its direct interest in the proceeding and its opposition to the action being proposed in that case. Specifically, in that tariff proceeding the City of Kenai filed letters opposing the proposed tariff action.[69] Significantly, the City of Kenai even declined the Commission's grant of intervenor status as a party to that proceeding[70] and, even in the

---

are directly at issue in this appeal. (AS 42.06.250, .305, and .290, respectively). Federal law does not give FERC similar regulatory authority. The issues raised on appeal are clearly within the RCA's authority to address. As such, the consolidated appeals cannot be moot when the relief Valdez seeks is well within the RCA's authority to provide.

[67] Dismissal Order at 8-10 [Exc. 315-17].

[68] *Kenai,* 736 P.2d at 760.

[69] *Id.* at 760-61.

[70] In designating the City of Kenai as an intervenor, the Commission stated, "In view of the City's strong opposition to the filing, the Commission decided . . . that it was necessary to suspend the operation of the proposed tariff revision and to expeditiously schedule a public hearing on the filing." Order U-83-074(1) (Sept. 6, 1983) at 2; 1983 WL 910433 (Alaska P.U.C.). Thus, on the strength of the opposition of one entity (expressed in comments, not a protest), the Commission determined that "it was necessary" to schedule a public hearing. This is in sharp contrast to Docket P-19-017 where hundreds of comments were filed, many in opposition to the application at issue in that docket. Further, "[t]he Commission also concluded that the City met the standards for intervention set forth in 3 AAC 48.110 and that full-party intervenor status should be granted to the City." Order U-83-074(1) at 2. That conclusion was on the Commission's own motion, not a decision on a petition to intervene.

face of such declination, was still determined by this Court to have standing to appeal the Commission's ruling on the tariff advice letter at issue in that proceeding.[71]

The *Kenai* Court cited to *Ketchikan Retail Liquor Dealers Association v. State, Alcoholic Beverage Control Board,* 602 P.2d 434 (Alaska 1979), which referred to the statutory definition of party as "the agency, the respondent, and *a person,* other than an officer or an employee of the agency in his official capacity, *who has been allowed to appear in the proceeding.*"[72] The *Kenai* Court went on to construe the word "appear" as used in AS 44.62.640(b)(4) to have the same general meaning as "participate."[73]

Ultimately, the *Kenai* Court applied a three-element test to determine whether standing to appeal had been achieved by the City of Kenai. The court considered whether the City (1) was directly interested in the proceedings, (2) was factually aggrieved by the decision, and (3) participated in the proceedings.[74] As demonstrated below, Valdez meets the "standing" criteria adopted by *Kenai* and the superior court erred in ruling otherwise.

A. Valdez Participated in Docket P-17-019.

The RCA has conceded that Valdez has participated in the underlying RCA proceeding sufficiently to meet the third prong of the *Kenai* standing test.[75] This concession is understandable since Valdez's participation as commenter equaled or

---

[71] *Kenai* at 763.

[72] *Kenai* at 762, citing to AS 44.62.640(b)(4) (emphasis in text of quoted opinion, *Ketchikan Retail,* 602 P.2d at 440). AS 44.62.640(b)(4) is part of the Alaska Administrative Procedure Act, made applicable to Valdez's appeal to the superior court pursuant to AS 42.06.480.

[73] *Kenai* at 762

[74] *Id.* at 762-63.

[75] RCA Motion to Dismiss at 2 [Exc. 230].

exceeded the participation of the City of Kenai in *Kenai*, which consisted of letters written to the Commission.[76] Not only has the RCA previously made this concession, it has also conceded that Valdez has standing to appeal Order 17. In this regard the RCA and the Hilcorp Entities have previously asserted 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.[77]

The above-stated position of the RCA and the Hilcorp Entities relies firmly on *Kenai*.[78]

As to the other elements of standing announced in *Kenai*, Valdez has a direct interest in Docket P-19-017 and was factually aggrieved by Order 17.

B. Valdez Was Directly Interested in Docket P-19-017 and Was Factually Aggrieved by Order 17.

The superior court is factually incorrect in its claim that "Valdez's participation in Docket P-19-017 was limited to filing comments objecting to the confidentiality only of the financial statements at issue in Order 6."[79] The superior court is also misguided in its assertions that Valdez did not "request a hearing, or seek to uncover the confidential documents"[80] and further in its proclamation that the RCA "held a public hearing."[81] These

---

[76] *Kenai*, 736 P.2d at 760-61.

[77] RCA Motion to Dismiss Order 6 Appeal, 3AN-20-05915CI (Apr. 30, 2020), at 6 [Exc. 135]; Hilcorp's Joinder in RCA's Motions to Dismiss Appeal and to Stay Transmittal of Agency Record, 3AN 20-05915CI (May 18, 2020) [Exc. 155] (emphasis added).

[78] *Id.*; *Kenai*, 736 P.2d at 762-63.

[79] Dismissal Order at 9 [Exc. 316].

[80] *Id.* at 2 [Exc. 309].

[81] *Id.* at 12 [Exc. 319].

significant misstatements in the Dismissal Order are readily borne out by a review of the RCA record of Docket P-19-017.

Valdez has a direct interest in Docket P-19-017 and was factually aggrieved by Order 17. Conversely, the Dismissal Order vaguely asserts that Valdez "never indicated any dispute or opposition to the transfer as a whole,"[82] and incorrectly asserts that "Valdez's Order 17 appeal does not purport that Valdez was *factually aggrieved* by Order 17."[83]

As a preliminary matter, neither Valdez nor any of the hundreds of others interested in RCA Docket P-19-017 had the ability to take an informed position (pro or con) on the TAPS-related transfer proposed in that docket. This inability is a direct product of the RCA's improper withholding, as confidential under AS 42.06.445(c), of the financial and other information necessary to make the determination as to whether or not the proposed transferee was financially fit, willing, and able to operate TAPS in the public interest. In the absence of this information, those interested in the docket were blind to facts that would have informed more definitive positions. On one hand, the RCA has withheld key financial and other information necessary to take a definitive position in the docket. On the other hand, the Dismissal Order criticizes Valdez for not taking a position.

---

[82] *Id.* at 9-10 [Exc. 316-17].
[83] *Id.* at 10 [Exc. 317].

Notwithstanding the RCA's improper withholding of the relevant information, Valdez made clear in its Written Comments,[84] Oral Comments,[85] Order 5 Comments,[86] and its Order 6 and Order 17 Statements of Points on Appeal[87] that (1) the subject financial and other information should not have been withheld as confidential, and such confidentiality effectively precluded Valdez and others interested in the docket from effectively participating; and (2) the failure of the RCA to hold a public evidentiary hearing on the important issues raised in Docket P-19-017 effectively silenced Valdez and those who would have participated in such a public forum.

Valdez's initial participation in Docket P-19-017 included nine pages of Written Comments to the RCA.[88] In its Written Comments, Valdez explained that it had prominent interest in the transfer proposed in Docket P-19-017 because significant facilities of TAPS were located within Valdez and that a large interest in those facilities was subject to the proposed transfer.[89] Furthermore, Valdez expressed concern about the financial capacity of the Harvest Alaska, the proposed transferee, to safely and successfully discharge its TAPS-related obligations.[90]

Importantly, Valdez devoted an entire section of its Written Comments to the importance of allowing public access to financial and operational information necessary to

---

84 Written Comments [Exc. 20].
85 Oral comments at Public Input Hearing Tr. [Exc. 70-72].
86 Order 5 Comments [Exc. 100].
87 Statements of Points: Order 6 [Exc. 371]; Order 17 [Exc. 374].
88 Written Comments [Exc. 20].
89 *Id*. at 2 [Exc. 21].
90 *Id*. at 2-3 [Exc. 21-22].

make meaningful comments about the transfer proposed in Docket P-19-017.[91] Valdez specifically noted that, in the absence of Harvest Alaska's financial and operational information, it would be impossible to adequately access whether transfer of operating authority of TAPS was appropriate.[92] Thus, from the beginning Valdez sought release of the information that has been withheld so that Valdez would be in a position to evaluate the financial ability of the proposed transferee to discharge its TAPS obligations. This position was consistent with the positions of many other commenters. In summarizing the contents of "well over 300 comments"[93] received by the RCA regarding Docket P-19-017 and its companion dockets, the RCA indicated as follows:[94]

> Comments in favor of rejecting the applications were often based on concerns about past environmental and safety issues arising in Alaska from operation of Harvest Alaska and its affiliates or concerns about the financial capacity of Harvest Alaska and its affiliates. Many of the comments in favor of rejecting the applications also asked that we deny Harvest Alaska's motion for waiver of the requirements of 3 AAC 48.625(a)(7)(B) and deny the petition for confidential treatment of financial records.

In addition, Valdez's Written Comments specifically asked that (1) the RCA set a deadline for the filing of petitions to intervene, in acknowledgement of the requirements of

---

[91] *Id.* at 2-3 and 6-7 [Exc. 21-22, 25-26]. As recognized by the Commission in Order 17 at 60-61, "[w]e determine whether an applicant has the financial ability to own a common carrier pipeline by evaluating the financial and operational information available to us"; and, "a pipeline owner must have the ability to provide additional capital to cover new investment in plant as it becomes needed or required, and must be sufficiently capitalized to cover the costs of unexpected occurrences—structural failure, oil spills, unplanned shutdowns, market upset, etc." (footnotes omitted) [Exc. 217-18].

[92] Written Comments at 7 [Exc. 26].

[93] Order 17 at 16 [Exc. 215].

[94] *Id.* at 16-17 [Exc. 215-16].

3 AAC 48.110, discussed below;[95] (2) the RCA permit intervenors to participate in an evidentiary process to establish a complete record;[96] and (3) the RCA allow intervenors to participate in a public hearing to fully develop a record.[97]

Valdez also offered Oral Comments through its counsel, Robin Brena, at the Public Input Hearing held by the RCA on February 4, 2020.[98] Given the three-minute time limit allotted to each commenter,[99] Mr. Brena devoted Valdez's Oral Comments to two primary topics. First, Valdez's Oral Comments reiterated Valdez's earlier Written Comments' theme of requesting that the RCA hold a public hearing to address the complex issues presented.[100] In addition, Valdez's Oral Comments urged that the burden was on the Applicants (BPPA and Harvest Alaska) to establish the right to confidentiality of the financial information that they had sought to have held as confidential, and that they had not met that burden.[101] On the topic of confidentiality, Mr. Brena added that in the absence

---

95 Written Comments at 7 [Exc. 26].
96 *Id*. at 7-8 [Exc. 26-27].
97 *Id*. at 8 [Exc. 27].
98 Public Input Hearing Tr. at 24-26[Exc. 70-72].
99 Order 4 at 11 [Exc. 62]; Public Input Hearing Tr. at 6-7 [Exc. 68-69].
100 Public Input Hearing Tr. at 24 and 26 [Exc. 70, 72].
101 *Id*. at 24-26. It should be noted that, as of the date of those Oral Comments, the issue of confidentiality under AS 42.06.445(c) had not been asserted or otherwise raised in the Docket P-19-017 proceedings, and therefore commenters had no way of knowing that AS 42.06.445(c) would later be raised by the RCA for the first time in Order P-19-017(5), Feb. 11, 2020 (Order 5) [Exc. 80]. Thus, Mr. Brena's comments on this topic were directed to the confidentiality petitions then on file and not confidentiality under AS 42.06.445(c). On this point, the Dismissal Order at 4 *erroneously* indicates that "[o]n September 27, 2018 the Applicants requested confidential treatment of these documents under Alaska Statute 42.06.445(c)." [Exc. 311] Applicants' request for confidential treatment under AS 42.06.445(c) was not asserted by Applicants until February 18, 2020, with the filing of Applicant's Joint Response to Order 5 at 2, 4, 7, 19 and 23 [Exc. 93A, 94, 95, 98, 99]. In Order 6 at 9 the RCA construed that filing as a supplement to Applicants' then pending

of public disclosure of the financial information that had been claimed as confidential, commenters were deprived of a meaningful opportunity to comment on the financial fitness or financial ability of Harvest Alaska to meet its proposed role as transferee and owner of BPPA's nearly 50 percent interest in TAPS.[102]

On September 14, 2020, Valdez filed supplemental material with the RCA supporting Valdez's Written Comments.[103] This material was comprised of information issued by Moody's Investors Services indicating that Hilcorp's corporate family credit ratings had been downgraded.[104] In addition to the foregoing, Valdez undertook the appeal of Order 6 because of the negative impact of that order on the ability of Valdez and the public to engage in the process of evaluating the Docket P-19-017 Application at issue, and the ability of Valdez and the public to provide meaningful public comment in Docket P-19-017.

Through its Written and Oral Comments to the RCA, as described above, and through its Comments Re Order 5,[105] Valdez expressed its direct interest in Docket P-19-017 and made it clear to the RCA that Valdez requested that a public evidentiary type hearing be set, that interventions be permitted, and that the pending confidentiality petitions be denied. Even the RCA characterized and construed Valdez's filings with the RCA as an opposition to the then-pending petitions for confidential

---

petitions for confidential treatment which had not previously asserted AS 42.06.445(c) as grounds for confidentiality [Exc. 120].

[102] Public Input Hearing Tr. at 27 [Exc. 73].

[103] *See* Order 17 at 16 [Exc. 215].

[104] Valdez's Informational Filing [Exc. 202].

[105] Order 5 Comments [Exc. 100].

treatment.[106] Given that Order 17 directly contradicted and impliedly denied Valdez's request for a public evidentiary type hearing on the Application for Transfer, there is no doubt that Valdez was factually aggrieved by Order 17.

The superior court's misstatement that the RCA "held a public hearing"[107] demonstrates that the superior court was confused about the nature of a public hearing, and it is possible the superior court believed that the public input hearing (held by the RCA) was an evidentiary public hearing requested by Valdez and not held by the RCA. These two types of hearings are quite different. A public input hearing, of the type held by the RCA in Docket P-19-017 on February 4, 2020, is a mechanism sometimes utilized to receive time-limited oral comments from the public.[108] Public comment is not evidence and may not be the basis for factual findings such as were made by the RCA in Order 17. For example, in Docket P-19-017 the RCA did not permit interested persons to intervene, serve or receive discovery, or cross-examine witnesses under oath. Instead, the RCA withheld core information and documents from the public under an unconstitutional and unlawful interpretation of AS 42.06.445(c) and then limited public oral comment to three minutes for each commenter.[109] This type of a public input hearing is not an evidentiary

---

[106] Order 6 at 10 [Exc. 121].
[107] Dismissal Order at 12 [Exc. 319].
[108] The Commission's Order 4 scheduling the *public input hearing* was specifically titled: Order Scheduling Public Input Hearing [Exc. 52]. Notice of that public input hearing also detailed that it was a public input hearing for purposes of receiving comment [Exc. 51]; and the Chairman's opening remarks at the hearing iterated the same limitation. Public Input Hearing Tr. at 6 [Exc. 68].
[109] Public Input Hearing Tr. at 6-7 [Exc. 68-69].

hearing designed to receive sworn testimony, exhibits, evidence, and argument[110] that Valdez[111] and others requested.[112] Thus, the superior court erred in concluding that a public hearing was held.

In fact, the RCA failed to even address Valdez's request for a public hearing or its request that interventions be permitted,[113] let alone hold a public hearing. It was not until the RCA issued Order 17 that it became clear the RCA would not hold a public hearing or permit interventions. In light of the above, Valdez did all that was reasonable within the context of the RCA's regulations, procedures, and practices to participate in the Docket P-19-017 proceeding. Thus, under the controlling authority of *Kenai*, Valdez did more than enough to have standing to appeal Order 17. Valdez has met the three-pronged *Kenai* test and has standing to participate in the Order 17 appeal.

---

[110] *See*, 3 AAC 48.150, .151, .153, .154, .155, and .156 which address the elements of a public evidentiary hearing.

[111] Written Comments at 7-8 [Exc. 26-27].

[112] *See, e.g.,* Public Input Hearing Tr. at 73:18-19, 107:15, 113:1, 149:1, 150:5, 155:23-24 [Exc. 74-79].

[113] In Order 6 at 12 the RCA expressly indicated that "[w]e have not yet determined whether we need an evidentiary hearing in these dockets," yet never expressly made that determination, leaving all interested persons in the dark as to how the RCA intended to proceed. [Exc. 123]. Again, in Order 7 at 17, the RCA indicated that it had not yet decided whether to hold an evidentiary hearing [Exc. 132]. Again, in the RCA's Motion to Dismiss, Apr. 30, 2020, at 5-6, the RCA indicated that it had not yet decided whether to hold a public hearing [Exc. 134-35].

III. VALDEZ EITHER EXHAUSTED ITS ADMINISTRATIVE REMEDIES OR WAS EXCUSED FROM DOING SO

The superior court's assertions that Valdez did not exhaust its administrative remedies are unmeritorious and cannot be sustained.[114] Valdez did all that it was required to do and allowed to do in Docket P-19-017 to permit Valdez to appeal Orders 6 and 17.

Valdez addresses below each of the superior court's six assertions that Valdez did not exhaust administrative remedies.[115] Significantly, the superior court acknowledges that it was required to decide whether the failure to exhaust remedies is excused[116]—but the superior court failed to address the issue of whether exhaustion was excused, even in light of the arguments advanced on this topic in Valdez's Opposition to Motions to Dismiss, filed May 24, 2021 (Valdez's Opposition).[117] For example, as explained in Valdez's Opposition, one may be excused from exhausting administrative remedies if such exhaustion would be futile due to the certainty of an adverse decision.[118] Such futility

---

[114] Dismissal Order at 10-12 [Exc. 317-19].
[115] *Id.* at 11 [Exc. 318].
[116] *Id.* at 10 [Exc. 317], citing to *FNSB*, 936 P.2d at 1260-61 (citing *Eufemio v. Kodiak Island Hosp.*, 837 P.2d 95, 98-99 (Alaska 1992), and *Moore v. State, Dep't. of Transp. & Pub. Facilities*, 875 P.2d 765, 767 Alaska 1994).
[117] Valdez's Opposition at 21-23 [Exc. 282-84]. Contemporaneous with the filing of the Motions to Dismiss, the BP Entities filed a Motion to Limit Scope of Consolidated Appeal (Scope Motion) [R.004856]. Valdez filed an Opposition to the Scope Motion [R.005317] contemporaneous with filing of Valdez's Opposition. In order to avoid duplication of arguments in Valdez's Opposition, Valdez incorporated by reference into its Opposition, arguments that Valdez made in opposition to the Scope Motion that were similar to those asserted in the Dismissal Motions. Valdez's Opposition at 21 [Exc. 282].
[118] *Id.* at 22-23 [Exc. 283-84].

exists when there is certainty of an adverse decision, as indicated in Valdez's Opposition[119] and below.

A. The Superior Court Erroneously Asserted that Because "Valdez Did Not Move to Intervene in P-19-017, Despite Stating in Its Initial Comments that It Would Do So,"[120] Valdez Did Not Exhaust Administrative Remedies.

The Dismissal Order, having referenced Valdez's failure to move to intervene in several instances,[121] appears to be premised in large part upon the superior court's perception that Valdez was required to request intervention into Docket P-19-017, or that such request would have made a difference in the outcome of the docket. The superior court attempts to advance its intervention contention by quoting Valdez's Written Comments wherein Valdez expressed its intent "to file a petition to intervene pursuant to the provisions of 3 AAC 48.110 or by the deadline established by the Commission for such pleadings in its docket."[122] Unfortunately, the right to file a petition to intervene under 3 AAC 48.110, according to its own terms, never ripened, and the RCA never invited intervention petitions and did not establish a deadline to file petitions to intervene. In this regard, 3 AAC 48.110 provides in pertinent part as follows:

> (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

---

[119] *Id.*

[120] Dismissal Order at 11 [Exc. 318].

[121] *Id.* at 1 ("Valdez . . . did not move to intervene as a party.") [Exc. 308]. *Id.* at 2 ("Valdez still did not move to intervene in the proceeding, . . .") [Exc. 309]; *Id.* at 4 ("Valdez never sought at any point to intervene in the case.") [Exc. 311]; *Id.* at 9, referencing the fact that Valdez ultimately did not [file a petition to intervene] [Exc. 316]; and *Id.* at 11 ("Valdez did not move to intervene in P-19-017, despite stating in its initial comments that it would do so.") [Exc. 27, 318].

[122] *Id.* at 9 [Exc. 316], citing to Valdez's Written Comments at 8 [Exc. 27].

> and hearing. The commission does not grant formal intervention, as such, in nonhearing matters.
>
> . . . .
>
> (d) Unless otherwise ordered by the commission, a petition for permission to intervene must be filed with the commission before the first prehearing conference or, if no conference is to be held, not later than 30 days before the hearing.

Based upon the express provisions of the RCA's intervention regulation, there was never a notice, opportunity, or right to file a petition to intervene in Docket P-19-017. Specifically, the RCA issued its decisions in that docket without "an evidentiary record after notice and hearing." There was thus no public hearing ordered by the RCA, and no notice, opportunity, or deadline for filing petitions to intervene. Therefore, while Valdez's Written Comments and Oral Comments requested an evidentiary public hearing, and indicated that Valdez would intervene when one was ordered, there was no notice or opportunity to do so. The doctrine of exhaustion did not require Valdez to petition to intervene in a public hearing that the RCA declined to conduct.

Even the RCA has agreed with the foregoing, previously indicating to the superior court that "[u]nder 3 AAC 48.110(a), the RCA does not generally invite or rule on petitions to intervene until it has decided whether to conduct a hearing. Since the RCA has not decided that issue yet, the City of Valdez is not a party to the administrative proceeding at this time."[123] Thus, the reliance placed by the superior court on the fact that Valdez did not file a petition to intervene is factually and legally false. Under the facts presented in Docket P-19-017, intervention was not possible because the prerequisites to intervention

---

[123] RCA's Motion to Dismiss, Apr. 30, 2020, at 5-6 [Exc. 134-35].

(RCA's decision to conduct a public hearing) did not occur. Therefore, intervention was not an administrative remedy available to Valdez, and the superior court erred in asserting that it was.

B. The Superior Court Erroneously Asserted that Because "Valdez Did Not File a Protest to the Application in P-19-017,"[124] Valdez Did Not Exhaust Administrative Remedies.

Pursuant to 3 AAC 48.654, "an interested person may file with the commission comments or a protest of the application," thereby providing an interested person with the option to file one or the other. Valdez was in complete compliance with the administrative remedy provided in this governing regulation by choosing to file comments with the RCA in Docket P-19-107 instead of a protest.

Importantly, 3 AAC 48.654 treats comments and protests as alternative approaches at the option of the interested person. The RCA may order an evidentiary hearing based upon a request made in comments or a request made in a formal protest, or on its own motion. In its comments, Valdez requested access to the basic financial information necessary to make meaningful public comments as a member of the public, requested an evidentiary hearing as an interested party, indicated its intention to file an intervention when permitted, raised its concerns with approving the Application for Transfer without conditions protecting the public interest, and requested the RCA consider a series of specific conditions to better protect the public interest. Adding the caption "protest" is not required by the RCA's regulations and would have not changed anything of substance.

---

[124] Dismissal Order at 11 [Exc. 318].

Setting aside the fact that there is no requirement for an interested person to file a formal protest, a formal protest under the circumstances of this case would have been a meaningless gesture because the core financial information necessary to properly form a protest was unconstitutionally and unlawfully withheld from Valdez. Formal protests require, among other things, "specific grounds for the protest, including a list of facts in dispute."[125] Valdez and the rest of the public were denied access to the specific financial and other information necessary to frame a protest or, perhaps more importantly, to even decide whether or not a formal protest was appropriate or prudent.

Finally, a formal protest has no form or meaning unless the RCA determines to investigate the concerns being raised and holds an evidentiary hearing. Despite literally hundreds of comments expressing concern with the financial fitness of Harvest Alaska, and dozens of requests for an evidentiary hearing and conditions to protect the public interest, the RCA surprisingly decided not to hold an evidentiary hearing before issuing Order 17. The RCA simply decided to avoid an evidentiary hearing—even though the Commission had numerous opportunities, dozens of requests, and the right to set a hearing on its own motion. The RCA cannot reasonably be permitted to now avoid judicial review by suggesting the failure to hold an evidentiary hearing was somehow Valdez's failure. To the contrary, Valdez fully availed itself of the administrative remedy provided by 3 AAC 48.654 when it filed its extensive comments, requested a hearing, and indicated a desire to participate through intervention.

---

[125] 3 AAC 48.654(b).

C. The Superior Court Erroneously Asserted that Because "Valdez Did Not File a Competing Application to P-19-017,"[126] Valdez Did Not Exhaust Administrative Remedies.

Regulation 3 AAC 48.645(c), relating to competing applications, comes into play only in a circumstance when there are two or more complete mutually exclusive applications.[127] This regulation does not impose any obligation to file a competing application as suggested by the superior court. To the extent that the superior court suggests that Valdez had a duty to file an application to compete with the application filed in Docket P-19-017 (i.e., an application proposing that BPPA's interest in TAPS be transferred to Valdez), the superior court is in error. As such, 3 AAC 48.645(c) does not state an administrative remedy that was reasonably available to Valdez, and Valdez was not required to file a competing application.

D. The Superior Court Erroneously Asserted that Because "Valdez Did Not Oppose the Confidential Treatment of Any Documents Other than Those at Issue in Order 6, and Did Not File Any Responsive Pleadings to Any Motion in P-19-017,"[128] Valdez Did Not Exhaust Administrative Remedies.

In Docket P-19-017, Valdez filed its Order 5 Comments for the specific purpose of challenging the RCA's Order 5 characterizations and interpretation of AS 42.06.445(c) and its suggestion that such statute provided sufficient grounds to hold the financial statements confidential. Order 6 rejected the concepts advanced by Valdez regarding AS 42.06.445(c), holding the subject financial statements to be confidential. The Order 6

---

[126] Dismissal Order at 11 [Exc. 318].
[127] 3 AAC 48.645(c) ("If the commission finds that two or more complete mutually exclusive applications have been timely filed, a public hearing will be held to afford an opportunity for examination of the applications on a comparative basis.").
[128] Dismissal Order at 11 [Exc. 318].

ruling then became the law of the case and the basis for all subsequent AS 42.06.445(c) based rulings in Docket P-19-017.

As mentioned above, one may be excused from exhausting administrative remedies if such exhaustion would be futile.[129] Such futility exists when there is certainty of an adverse decision.[130] Valdez is excused from the requirement to object to AS 42.06.445(c) confidentiality rulings after Order 6, to the extent that such requirement existed, because any such overtures by Valdez would have been rejected by the Commission, consistent with Order 6, and therefore such efforts would have been futile.[131]

Valdez did clearly oppose the AS 42.06.445(c) confidential treatment of several documents that contained the basic financial information necessary to properly form public comments. For that matter, Valdez filed a proper and timely appeal of such erroneous confidentiality designations with the superior court. The fact that Valdez did not oppose

---

[129] *Bruns v. Municipality of Anchorage, Anchorage Water & Waste Water Utility*, 32 P.3d 362, 371 (Alaska 2001) ("We have stated that the failure to exhaust administrative remedies is excused 'where the administrative remedy is inadequate or where the pursuit of the administrative remedy would be futile due to the certainty of an adverse decision.'), citing to *Eidelson v. Archer*, 645 P.2d 171, 181 (Alaska 1982).

[130] *Standard Alaska Prod. Co. v. State, Dep't of Revenue*, 773 P.2d 201, 209 (Alaska 1989) ("Where exhaustion of administrative remedies will be futile because of the certainty of an adverse decision, a party need not obtain a final agency ruling before seeking judicial review.").

[131] *See Matanuska Electric Association, Inc. vs. Chugach Electric Association, Inc.*, 99 P.3d 553 (Alaska 2004) (MEA), at 560-61 ("A party must generally exhaust administrative remedies before bringing an action challenging an agency decision; this allows the agency to apply its expertise and correct its own errors. But this requirement may be excused where the attempt to exhaust administrative remedies is futile or severely impractical. We have held the pursuit of administrative relief to be futile where an administrative body refuses to address a legal claim brought by a petitioner. In this case, MEA brought its claim before the Commission, which dismissed the claim without adjudication. The exhaustion requirement is thus excused in this case." (Citations omitted)).

the confidential designation of every document does not impact Valdez's standing to appeal the underlying issues raised by the RCA's use of unconstitutional and unlawful AS 42.06.445(c) designations that Valdez did oppose.

Further, the RCA's post-Order 6 confidentiality rulings in Orders P-19-017(11),[132] (13),[133] (14)[134] and (15),[135] all used the identical unconstitutional and unlawful interpretation of AS 42.06.445(c) and, in fact, relied upon its prior interpretation in Order 6.[136] That is, in the subsequent confidentiality rulings, the Commission expressly

---

[132] Order P-19-017(11), July 2, 2020 (Order 11) [R.003773].
[133] Order P-19-017(13), Aug. 6, 2020 (Order 13) [R.004241].
[134] Order P-19-017(14), Aug. 27, 2020 (Order 14) [R.004253].
[135] Order P-19-017(15), Sept. 4, 2020 (Order 15), permitting 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 be filed with the legend "Confidential Pursuant to AS 42.06.445(c)" without an accompanying petition for confidential treatment.") (Order 15 at 2) [Exc. 201].
[136] 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.") [Exc. 175]; 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. The submitted FAAs relate to the operations and finances of three pipelines subject to federal jurisdiction and are not required to be filed with the FERC, the appropriate federal agency with regard to pipeline acquisitions.") [Exc. 195-96]; 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]. Consistent with that decision, we find the financial statements identified in the July 28 Petition 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.") [Exc. 198-99]. Order 15 did not provide any

referenced the previous Order 6 ruling as well as its Order 6 rationale to support the decision to designate materials confidential under AS 42.06.445(c). The RCA's Order 6 ruling established the law of the case and was repeatedly and identically applied by the RCA multiple times. As such, the RCA's Order 6 ruling cannot be separated or otherwise isolated from the other AS 42.06.445(c) rulings made in Docket P-19-017, as they are inextricably linked. To have standing to appeal the issue, Valdez is not required to repeat the identical arguments multiple times for each document once the RCA has ruled on the issue. Valdez voiced its opposition to the petitions for confidentiality in the underlying proceeding, to the RCA's interpretation of AS 42.06.445(c), and to the RCA's application of that statute in Docket P-19-017. Given the foregoing, including the RCA's Order 6 ruling regarding confidentiality under AS 42.06.445(c) and its subsequent confidentiality rulings based upon the same analysis and rationale as expressed Order 6, Valdez was excused from opposing every post-Order 6 confidentiality decision due to the certainty of an adverse decision had Valdez taken that action.

It cannot be more clear that through its participation in Docket P-19-017 as outlined above, Valdez asserted its rights to have (1) access to the documents central to the RCA's determination; (2) due process; (3) the public interest protected by the RCA's conducting a hearing and permitting interested persons to intervene in order to develop a full record; and (4) the public interest protected through future conditions imposed on the transaction

---

independent reasoning or rationale for permission to file documents in response thereto as confidential, with the exception of the prerequisite that any such document submission must "qualif[y] for confidential treatment by us [the RCA]." [R.004261].

to ensure all Alaskans' fundamental rights to meaningfully engage in government actions were preserved. All of these requests were denied.

In Docket P-19-017, Valdez filed its Order 5 Comments for the specific purpose of challenging the RCA's Order 5 characterizations and interpretation of AS 42.06.445(c) and its suggestion that such statute provided sufficient grounds to hold the Financial Statements confidential. Order 6 rejected the concepts advanced by Valdez regarding AS 42.06.445(c), holding instead that the subject financial statements were to be held as confidential. The Order 6 ruling then became the law of the case and the basis for all subsequent AS 42.06.445(c) based rulings in Docket P-19-017. Valdez is excused from the requirement to object to AS 42.06.445(c) confidentiality rulings after Order 6, to the extent that such requirement existed, because any such overtures by Valdez would have been rejected by the Commission, consistent with Order 6, and therefore such efforts would have been futile and are excused.

E. The Superior Court Erroneously Asserted that Because "Valdez Did Not Utilize or Exhaust the RCA's Procedures to Access Confidential Documents,"[137] Valdez Did Not Exhaust Administrative Remedies.

There is no reason to ask the RCA to exercise its discretion and permit access to confidential documents *after* the RCA had clearly ruled it had no discretion whatsoever to make those confidential documents public. Under the RCA's AS 42.06.445(c) holdings, if a document concerns the finances or operations of a federally regulated pipeline and is not filed with the FERC, then the RCA has no discretion but to deny access. Specifically,

[137] Dismissal Order at 11 [Exc. 318].

the RCA ruled that if these requirements are met, *"we have no discretion to release the documents to the public. We must treat the documents as confidential."*[138] Either the Commission has discretion to weigh factors permitting confidentiality, or it does not. Given the RCA's ruling, there is no possible argument for disclosure of AS 42.06.445(c) documents under the RCA's 3 AAC 48.049 discretion.[139] Under the RCA's ruling, it lacked the discretion to give Valdez access to documents held as confidential under AS 42.06.445(c), and a filing under 3 AAC 48.049 requesting the RCA to exercise discretion that it asserts it does not possess would have been a meaningless exercise.

Valdez requested access by the general public as required under AS 42.06.445(a)[140] to ensure that public comments were properly informed and meaningful, not access limited only to Valdez. Thus, even assuming the RCA had discretion under 3 AAC 48.049 over an AS 42.06.445(c) document, such discretion would not permit the overall public access requested by Valdez. Therefore, 3 AAC 48.049 does not provide a suitable or comparable legal remedy for the RCA's withholding the documents from the public. The RCA's misinterpretation and application of AS 42.06.445(c) held the documents confidential and

---

[138] Order 6 at 13 (emphasis added) [Exc. 124].

[139] The RCA has only permitted access to AS 42.06.445(c) documents to parties to an evidentiary hearing pursuant to a protective order. Even this limited access is contradicted by the terms of AS 42.06.445(c) which limits access *only* to "an appropriate officer or official of the state for relevant purposes of the state." Such permission is not possible here since the RCA refused to hold an evidentiary hearing in Docket P-19-017, and moreover, such a disclosure is contradicted by the RCA's interpretation of AS 42.06.445(c).

[140] AS 42.06.445(a) ("Except as provided in (b) and (c) of this section, or prohibited from disclosure under state law, records in the possession of the commission are open to public inspection at reasonable times"). Assuming that Valdez is correct in its interpretation of AS 42.06.445(c) that the exception to disclosure is not applicable, the general rule in AS 42.06.445(a) of public disclosure is applicable.

inaccessible to the public. As such, a motion under 3 AAC 48.049 would have been fruitless.

F. The Superior Court Erroneously Asserted that Because "Valdez Did Not Provide the RCA with Any Other Meaningful Indication that It Believed the Agency's Procedures for Receiving Public Input Were Deficient,"[141] Valdez Did Not Exhaust Its Administrative Remedies.

As demonstrated above, Valdez clearly articulated the basis for requesting the public disclosure of the documents at issue in its Written Comments, Oral Comments, Order 5 Comments, Order 6 Points on Appeal, Order 17 Points on Appeal, as well as requests for expedited consideration of the Order 6 appeal. Clearly and unequivocally, Valdez repeatedly (1) made requests that the RCA hold a public evidentiary hearing in Docket P-19-017 for the purpose of permitting interested persons to participate in the adjudication process, and (2) made it clear that in the absence of providing public access to the Financial Statement and Additional Information ultimately held to be confidential, Valdez and the public generally were being denied the opportunity to meaningfully provide public comment or participate in the Docket P-19-017 administrative process. These points were also carried into Valdez's Order 6 Statement of Points on Appeal.[142] A plain reading of Valdez's Docket P-19-017 filings and the Order 6 Statement of Points on Appeal dispels any notion that Valdez did not provide the RCA with meaningful indications that, in the

---

[141] Dismissal Order at 11 [Exc. 318].

[142] Valdez's Statement of Points on Appeal, Apr. 13, 2020 at 2 ("7. The RCA erred in broadly rather than narrowly interpreting AS 42.06.445(c), as an exception to the general rule allowing public access to documents filed with the RCA, in violation of fundamental rights under the Alaska and United States Constitutions, thereby impeding transparency and the right to question, investigate, and monitor the discharge of the RCA's duties.").

absence of a public hearing and providing access to the subject financial documents, the RCA's procedures were deficient and unfairly deprived Valdez and others from meaningful participation in Docket P-19-017.

Therefore, Valdez did not fail to exhaust its administrative remedies. Valdez's participation in Docket P-19-017 as described above discharged any obligation that it had to exhaust administrative remedies, and failure to exhaust such remedies is not a valid ground for the dismissal of the Order 6 and Order 17 appeals.

IV. VALDEZ'S APPEAL OF RCA RULINGS ARE NOT MOOT

As a general proposition, the Alaska Supreme Court has characterized mootness as follows:

> We have ruled that, "'[u]nder ordinary circumstances, we will refrain from deciding questions where events have rendered the legal issue moot.'" A claim is moot if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails. Mootness can also occur when "a party no longer has a personal stake in the controversy and has, in essence, been divested of standing." "The basic requirement for standing in Alaska is adversity."[143]

In this appeal, virtually every issue substantively or procedurally determined by the RCA through Orders 6 and 17 is a live issue under this Court-stated standard for mootness. The Dismissal Order, if permitted to stand, means that the closing of the BPPA-Harvest Alaska transaction, within four days of the issuance of Order 17, and well before running of the thirty-day appeal period, precluded any review whatsoever of any aspect of Order 17. Therefore, it seems to be the RCA's position that by the unilateral acts of BPPA and Harvest Alaska, Order 17 became nonreviewable by an appellate court. These implications

---

[143] *Fairbanks Fire Fighters Ass'n*, 48 P.3d at 1167 (citations omitted).

of the Dismissal Order's impact are contrary to the rights of due process and patently unreasonable.

In support of its mootness holding, the superior court noted that "[a] claim is moot if 'it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails."[144] The superior court also concluded that "[b]ecause the relief sought by Valdez would not have any bearing on the overall transaction in Docket P-19-017, the matter is moot."[145] The superior court further concluded that "a judicial determination that the RCA erred in any of its confidentiality rulings would not, without further court order, undo the complex and final transaction."[146]

As a preliminary matter, Valdez is not seeking to undo the transaction, even though the Applicants took the risk of their transaction being undone on appeal when they commercially closed the transaction before having obtained a final and non-appealable order approving their commercial transaction. Applicants' commercial closing of their transaction before a final, non-appealable order is entered does not somehow exempt Applicants, the current or past CPCN holders, or TAPS from judicial review of the RCA's final orders, the constitutional rights of Alaskans, or the terms of the Alaska Pipeline Act. Instead, they are subject to current and ongoing regulation and judicial review. Fortunately, neither the superior court nor this Court need decide whether to undo the transaction because that is not a judicial remedy Valdez is requesting. Instead, there are

---

[144] Dismissal Order at 13 [Exc. 320].
[145] *Id.* at 12 [Exc. 319].
[146] *Id.* at 13 [Exc. 320].

three categories of live issues for which Valdez is seeking judicial redress. Each of these three groups of live issues stand alone and are not codependent.

First, Valdez is seeking to have this Court rule that Valdez and all Alaskans have the constitutional and statutory right to have access to the public financial documents the Applicants filed in support of their claim to be fit, willing, and able to operate TAPS as well as those filed subsequently in support of their ongoing regulatory obligations to the RCA under the terms of the Alaska Pipeline Act. This remedy is intended to provide public access to Applicants' financial documents, considered by the RCA in approving the transaction, as well as Applicants' financial documents required by the RCA's conditions of approval or by statute or regulation to be filed as part of the RCA's ongoing monitoring and regulation of their financial condition and performance. Access to such financial information would allow Valdez and all Alaskans the opportunity to know the financial condition and the fitness, willingness, and ability of the CPCN holder to fulfil its undertaken and ongoing regulatory obligations under the CPCN and the Alaska Pipeline Act. Clarification of Valdez's and all Alaskans' rights to have access to those public financial documents is critical to the ability to engage in the regulatory process on an ongoing basis and to raise concerns as needed to ensure the ongoing and safe operation of TAPS and every other pipeline subject to state regulation in Alaska.

Second, Valdez is seeking to have this Court rule that Valdez and all Alaskans have the constitutional and statutory right to provide meaningful comments based on the financial documents once they are made public. Such comments would include comments on additional terms and conditions to CPCN No. 311 or to the CPCN holder to better

protect the public interest. The Applicants closing of the transaction does not prevent an appellate Court from requiring the RCA provide public access to the relevant financial documents; nor does it prevent the RCA from considering whether based on meaningful public comments there are additional conditions appropriate to apply to the CPCN No. 311 or to the current CPCN holder to ensure the terms of the Alaska Pipeline Act, requiring pipelines to be regulated for the public interest, are being met.

Third, Valdez is seeking to have this Court rule that the RCA is required by the constitution and by statute to identify interested parties, permit interventions, and hold a hearing before either approving the Applicants' application to acquire CPCN No. 311 or before modifying or amending the DR&R obligations associated with CPCN No. 311. In fact, it is inconceivable that the RCA modified and amended the existing DR&R obligations associated with CPCN No. 311 by removing $2.5 billion in existing DR&R obligations and potentially $2.5 billion more in potential refund obligations without holding a hearing that including interested persons. The Alaska Pipeline Act provides the RCA may amend or modify a CPCN only "after notice and hearing and for good cause shown."[147] The Alaska Pipeline Act further provides the RCA "shall hold a public hearing" on *any* application for issuance of a CPCN,[148] and shall "summarily approve" the transfer of operating authority under a CPCN only when it is a "transfer not involving a substantial change in ownership."[149] This transfer involves a substantial amendment and modification

[147] AS 42.06.300.
[148] AS 42.06.260 (emphasis added).
[149] AS 42.06.305(a).

of CPCN No. 311, a substantial change in ownership, and is the most important transfer the RCA has ever undertaken. Under the circumstances of the underlying proceeding, the RCA was obligated to hold a hearing, and did not. The Alaska constitution does not allow the RCA to substantially change the property or other rights of interested persons without a hearing. The Alaska Pipeline Act and the RCA's precedents require the RCA to hold a hearing under the circumstances of the underlying case. Further, absent an evidentiary hearing, the RCA does not have the evidentiary record necessary to make the types of contested factual findings set forth throughout Order 17. Conducting such a hearing can ensure the rights of others are properly protected without undoing the commercial transaction. There is simply no reason the conditions required by the RCA for the transaction or ongoing regulation of the CPCN holder and TAPS may not be those required after a constitutional and statutorily proper hearing.

As a general matter, this Court's precedent broadly construes standing and disfavors the dismissal of claims.[150] Moreover, this Court has recognized that "[i]n most cases, mootness is found because the party raising an appeal cannot be given the remedy it seeks, even if the court agrees with its legal position."[151] As noted above however, this is not one

---

[150] *Friends of Willow Lake, Inc. v. State DOT*, 280 P.3d 542, 546 (Alaska 2012) ("'[t]he concept of standing has been interpreted broadly in Alaska,' with adversity being the basic requirement.") (citations omitted); 35B Corpus Juris Secundum, Federal Civil Procedure § 777 ("A motion for dismissal is a harsh remedy, and drastic sanction, and usually awarded only as a last resort. The Federal Rules of Civil Procedure contemplate a decision of controversies on the merits without unreasonable delay rather than their dismissal on technicalities, and outright dismissal for reasons not going to the merits is viewed with disfavor in the federal courts.") (citations omitted).

[151] *Fairbanks Fire Fighters Ass'n*, 48 P.3d at 1168.

of those cases. Valdez is not seeking to "undo" the transaction at issue. On this point, the superior court ruled on standing and mootness prior to allowing briefing on the underlying issues and appears to have assumed that Valdez's partial list of potential appeal outcomes was intended to be exhaustive[152] – it was never intended to be so. Also, as noted above there are numerous potential outcomes that can provide Valdez with the relief it seeks without undoing the now-closed transaction.

To focus the potential outcomes for purposes of argument on the single issue of the RCA's erroneous interpretation and application of AS 42.06.445(c), the RCA has held that any document related to the financial or operational affairs of a pipeline (the RCA has acknowledged that every document filed with the RCA is related to the financial or operational affairs of the pipeline)[153] is confidential if the pipeline carrier is subject to federal regulation (crude oil pipeline carriers in Alaska are subject to federal regulation)[154] unless it is filed with a federal agency (federal agencies do not require the filing of

---

[152] Valdez' Supplemental Opposition to Motion to Dismiss at 2-3 [Exc. 290-91].

[153] The RCA has noted that "AS 42.06.445(c) is an unusual section among public records provisions because it protects a broad spectrum of information that would normally be disclosed during rate proceedings of a regulated entity." Order Finding that Information Contained in TAPS Settlement Methodology Disks or Derived from Them Is Confidential and Denying Request for Nonconfidential Treatment, RCA Order P-97-004(76), Apr. 7, 2000 (Order 76), at 12 (2000 WL 36271342 (Alaska P.U.C.). As a result of this broad interpretation, the Commission went on to say that "[t]he Commission expects pipeline carriers to use restraint in designating documents in a rate case as confidential. Any documents that are otherwise publicly available, even though they technically fall within the protection of AS 42.06.445(c), should not be designated confidential in a rate case." Order 76 at 12, n.22.

[154] At the time the Alaska Pipeline Act was passed, every pipeline carrier was subject to federal regulation. Today, one minor pipeline on the Kenai Peninsula has suspended its federal operations, but is still subject to federal regulation should it resume interstate shipments.

documents related to the state regulation).[155] The RCA's interpretation means that every document filed with the RCA relating to its regulation of crude oil pipelines in Alaska is confidential by law under AS 42.06.445(c), and the RCA has no discretion to make that document public. In practical effect, the RCA has determined that every document concerning the state regulation of TAPS must be held secret from Alaskans.[156]

Valdez believes this Court's review of the RCA's extreme interpretation of AS 42.06.445(c) in the underlying proceeding must occur because the RCA has sacrificed the rights of Valdez and every Alaskan to meaningfully engage in state regulatory pipeline

---

[155] In rare instances, the RCA may require a federal filing such as an annual report to also be filed with the RCA, but the FERC does not typically require a state filing to be filed with the FERC.

[156] The RCA's interpretation vastly and unconstitutionally expands the scope of the AS 42.06.445(c) exception to include all documents concerning a pipeline's finances or operations subject to *state* jurisdiction by assuming the limiting adjective phrase, "subject to federal jurisdiction," modifies the word "pipeline" and does not modify the phrase "finances or operations" or the phrase "finances or operations of a pipeline." A far more plausible interpretation would be to assume the documents held confidential would be those documents concerning the pipeline's "finances and affairs" that are "subject to federal jurisdiction." Similarly, the phrase, "subject to federal jurisdiction" may also more plausibly be read to modify the phase "finances or operations of a pipeline" that would again restrict the scope of the AS 42.06.445(c) exception to documents relating to a pipeline's finances or operations that are subject to federal jurisdiction. Under these more plausible interpretations, the AS 42.06.445(c) exception would only limit public disclosure of documents relating to a pipeline's finances or operations subject to *federal* regulation and not on file with a *federal* agency. It makes perfect sense to limit the public disclosure of documents relating to a pipeline's federal regulation when they are not also on file with the agency responsible for federal regulation. Under these more plausible interpretations, the AS 42.06.445(c) exception would *not* limit the public disclosure of documents relating to a pipeline's finances or operations subject to *state* regulation and on file with the RCA. It also makes perfect sense *not* to limit the public disclosure of documents relating to a pipeline's state regulation when they are on file with the agency responsible for state regulation.

matters of great public significance. Such matters should not be substantively addressed and not so readily dismissed based on standing and mootness grounds.

This Court could ultimately rule the RCA's interpretation and application of AS 42.06.445(c) is incorrect and that the RCA be directed to vacate the portions of Order 6, orders relying thereon, and Order 17 that grant confidentiality under that statute. Alternatively, this Court could rule that the RCA correctly interpreted and applied AS 42.06.445(c), but that such statute, as applied, is unconstitutional.[157] Either ruling would provide Valdez with the relief that it seeks.

Beyond any such ruling, it would be appropriate to order the RCA to (1) consider other non-AS 42.06.445(c) grounds for confidentiality that have been asserted but held to be mooted by the erroneous ruling,[158] (2) permit public participation in that process, and (3) make available to the public any documents and information that do not meet applicable standards for confidentiality. Given that this process could result in the release to the public of documents and information previously held as confidential, the Order 6 and 17 appeals

---

[157] Valdez's primary argument in appealing Orders 6 and 17 is that the RCA has misinterpreted and misapplied AS 42.06.445(c), thereby maintaining documents as confidential that, through the correct interpretation and application of that statute could otherwise be available to the public. If, however, it is ultimately determined that the RCA has correctly interpreted AS 42.06.445(c), Valdez contends that such statute is unconstitutional because it requires the confidentiality of documents that should otherwise be available to the public. Since this latter alternative argument asserts that a statute is not constitutional, exhaustion of administrative remedies is not required to make this assertion. *FNSB*, 936 P.2d at 1261 ("[I]f the claim does not challenge any particular decision by an agency and instead calls upon the superior court to review only the validity of a statute, exhaustion of administrative remedies is not required."), citing *Moore v. State, Dept. of Transp. and Public Facilities*, 875 P.2d 765 at 768 (Alaska 1994).

[158] *See* Order 6 at 16 ("We do not apply the 3 AAC 48.045 balancing test. We find the requests for confidential treatment under 3 AAC 48.045 moot.") [Exc. 127].

are not moot, since the Court still possesses the ability (even in light of the transaction closing) to effectuate the public disclosure of documents and information that had previously been unreasonably held as confidential and to foreclose the Commission's future unconstitutional and unlawful interpretation of AS 42.06.445(c). Alternatively, a ruling that the RCA properly interpreted AS 42.06.445(c) would make the constitutionality of such statute ripe for decision.

The foregoing process could also provide the public with the opportunity to advocate for conditions to be imposed upon Harvest Alaska in the operation of the TAPS CPCN. This public participation could be a proxy for the public participation which was the result of the RCA's failure to hold a public hearing or permit other meaningful participation in the Docket P-19-017 process. The foregoing examples are not intended to be an exclusive list of potential outcomes of the appeal process but are included to demonstrate that relief for Valdez in the appeal process is available short of undoing the BPPA/Harvest Alaska transaction.

The concept of an appeal outcome that adds or clarifies conditions to the transfer approved in Order 17 is consistent with Valdez's Written Comments which suggested that the RCA should impose reasonable conditions to the proposed transfer[159] and is well within

---

[159] Valdez's Written Comments at 3 ("In light of the importance of TAPS to Alaska and its citizens and the nature of Hilcorp as an operator, the RCA should fully examine the implications of the proposed transfer of operating authority as well as establish conditions that ensure the transfer is in the "best interest of the public.") [Exc. 22]; at 4-5 ("Hilcorp's record of regulatory noncompliance and safety and environmental incidents while operating gas and oil production and transportation systems much smaller than TAPS warrants heightened Commission scrutiny of the Application and the imposition of conditions that ensures Hilcorp will safely and reliably operate TAPS.") (citations omitted)

the continuing authority of the RCA. As noted above, the RCA has the continuing regulatory obligation to ensure TAPS is operated within the public interest. In doing so, its regulatory authority extends to all matters not preempted by federal law. This is not a case of a judge being asked to undo a transaction but is a case of a regulator being asked to regulate consistent with the public interest. All the remedies being suggested by Valdez are both within the regulatory authority of the RCA to impose and, as such, within the power of the superior court to order on remand.

The public has a fundamental right to access documents that are not properly held as confidential.[160] This right alone is sufficient grounds to allow the Order 6 and Order 17 appeals to proceed. Furthermore, access to the subject documents and information will provide Valdez and the public at large with baseline information considered by the RCA in making its Order 17 ruling. This information is important to the public in assessing Harvest Alaska's present and continuing fitness to possess a TAPS CPCN and in

---

[Exc. 23-24]; at 7-8 ("In the present case, the RCA should invoke its regulatory powers to . . . (3) consider conditions to the proposed transfer that provide additional protections to ensure Hilcorp will maintain programs, personnel, and resources to safely and reliably operate TAPS and (4) require that Hilcorp and BPPA maintain financial resources sufficient to respond to environmental and safety catastrophes and to satisfy DR&R responsibilities.") (citations omitted) [Exc. 26-27].

[160] AS 42.06.445(a); AS 40.25.110(a); *City of Fairbanks v. Alaska Pub. Utils. Comm'n*, 611 P.2d 493, 494-97 (Alaska 1980) (citing *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292 (1937)); *Basey v. State*, 462 P.3d 529, 533-34 (Alaska 2020) (citing *Gwich'in Steering Comm. v. State, Office of the Governor*, 10 P.3d 572, 578 (Alaska 2000), quoting *City of Kenai v. Kenai Peninsula Newspapers, Inc*., 642 P.2d 1316, 1323-24 (Alaska 1982); *Gwich'in*, 10 P.3d at 578; *Jones v. Jennings*, 788 P.2d 732, 735 (Alaska 1990). *See also, Fuller v. City of Homer*, 75 P.3d 1059, 1062 (Alaska 2003) (citing *Jones v. Jennings*).

participating in any additional proceedings that the RCA may order to rectify its withholding of documents as confidential.

The RCA's grant of the Application for Transfer is subject to numerous conditions, several of which require the ongoing duty to file financial information with the RCA.[161] During 2021, both Harvest Alaska and BPCNA made compliance filings in Docket P-19-017, each of which has been accompanied by assertions of confidentiality under AS 42.06.445(c).[162] There is every reason to believe that Harvest Alaska and the BP Entities not only have made, but will continue to make, Order 17 compliance filings with the RCA as confidential, based upon the RCA's flawed interpretation and application of this statute. In the absence of the Order 6 and Order 17 appeals, Valdez and the Alaska public will continue to be in the dark about Harvest Alaska's financial condition in the future. A ruling by this Court in favor of Valdez on its Order 6 and Order 17 appeals, on their merits, has the potential to provide Valdez and the Alaska public with access to documents filed and to be filed in compliance with Order 17, that would otherwise be

---

[161] Order 17 at 104-11 [Exc. 219-26].

[162] Harvest Alaska's First Compliance Filing in Response to Condition 5 of Order No. 17, Jan. 6, 2021 [R.004553]; BPCNA's Compliance Filing in Response to Order No. 17, Apr. 29, 2021; Harvest Alaska and Harvest Midstream's Compliance Filing of Documents Submitted to DNR in Response to Order No. 17, June 1, 2021; Harvest Alaska's Petition for Confidential Treatment of Certain Compliance Filings Submitted Pursuant to Order 17 for Harvest Alaska & Harvest Midstream, June 1, 2021; BPCNA's Compliance Filing in Response to Order No. 17, Aug. 9, 2021; Harvest Alaska's Compliance Filing of Documents Submitted to DNR in Response to Order No. 17, Aug. 27, 2021; Harvest Alaska's Petition for Confidential Treatment of Certain Compliance Filings Submitted Pursuant to Order 17, Aug. 27, 2021. All but the first of the above-described documents are not in the record on appeal but can be viewed at this link: Regulatory Commission of Alaska - Docket: P-19-015

designated as confidential and unavailable for public inspection and scrutiny. Thus, the relief requested in the Order 6 and 17 appeals can be achieved without undoing the subject transaction.

V. EVEN IF THE CONSOLIDATED APPEALS ARE MOOT, EXCEPTIONS TO MOOTNESS ARE APPLICABLE IN THIS CASE

Even if the Order 6 and 17 appeals are moot, consideration of applicable exceptions to mootness compel reversal and remand of the Dismissal Order.

A. The Public Interest Exception to Mootness Is Applicable in this Case.

A line of Alaska Supreme Court cases has long endorsed a "public interest exception" to mootness permitting an otherwise moot appeal to proceed.[163] For example, in the case of *Municipality of Anchorage v. Anchorage Daily News*,[164] the court applied the public interest exception to mootness and determined that the appeal should still be considered even though the matter was moot. In that case, the court considered consolidated appeals from superior court orders compelling the Municipality of Anchorage

---

[163] For example, *see Doe v. State*, 487 P.2d 47, 53 (Alaska 1971) ("Ordinarily we will refrain from deciding questions where the facts have rendered the legal issues moot. But where the matter is one of grave public concern and is recurrent but is capable of evading review, we have undertaken review even though the question may be technically moot."); *Etheredge v. Bradley*, 502 P.2d 146, 153 (Alaska 1972) ("Mootness is a construction of judicial policy, not of constitutional law. We have therefore adopted the longstanding exception to the mootness doctrine that allows review of questions that, although technically moot in a given case, are 'capable of repetition, yet evading review.'") (citations omitted.); *Hays v. Charney*, 693 P.2d 831, 834 (Alaska 1985) ("The Legislators would have us invoke the public interest exception to the mootness doctrine: '[W]here the matter is one of grave public concern and is recurrent but is capable of evading review, we have undertaken review even though the question may be technically moot.'") (citation omitted); and *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 588 (Alaska 1990) (citations omitted).

[164] *Id.* at 584.

to provide the Anchorage Daily News with an employee performance report issued by the Anchorage Library Advisory Board and a Blue-Ribbon Panel fiscal report and requiring that certain depositions be taken.[165]

In *Anchorage Daily News*, this Court recognized that,

> The disputes which prompted these lawsuits are technically moot. The Revelle evaluation and Blue Ribbon Panel report have already been released; Daily News personnel requesting the Blue Ribbon Panel report have already been deposed. In each case the losing party has submitted to an order by the superior court, the effects of which cannot be undone. Thus, none of the consolidated appeals presents a live controversy.[166]

In spite of the *Anchorage Daily News* Court's mootness finding, it held that the public interest exception to mootness was applicable and allowed the appeals to continue:

> As a general rule, we "refrain from deciding questions 'where the facts have rendered the legal issues moot.'" However, we have held that mootness doctrine is a product of judicial policy, not constitutional mandate, and have recognized on numerous occasions that certain technically moot questions merit review under the "public interest" exception to the mootness doctrine. This court recently reiterated 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.
>
> We conclude that the questions presented in these appeals come within the public interest exception. First, the issues are capable of repetition so long as newspapers and other members of the public continue to make requests for documents from the municipality. Indeed, a history of ongoing document request disputes between the municipality and the Daily News is reflected in the record before us. Second, it is possible for document request cases repeatedly to evade review by application of the mootness doctrine, since

---

[165] *Id.* at 586.
[166] *Id.* at 588.

> time is of the essence in release cases and orders by the superior court will normally be enforced prior to review by this court. Finally, the questions presented are of considerable public importance. Therefore, we decline to apply the mootness doctrine to any of the issues in these consolidated appeals.[167]

The three public-interest exception factors referenced in *Anchorage Daily News,* and discussed below, support a finding that the public interest exception is applicable to the matters before this Court.

1. Whether the Disputed Issues Are Capable of Repetition.

There can be no reasonable doubt that the disputed issues raised by Valdez in the appeals of Order 6 and 17 are capable of repetition. Prime examples of such repetition are a matter of record in Docket P-19-017 and other RCA dockets. As discussed above, in Docket P-19-017, the RCA has issued numerous orders that repeatedly apply the same erroneous interpretation of AS 42.06.445(c). Based upon that interpretation, the RCA has justified the confidential designation of extensive documents and information that should not have otherwise been subject to such AS 42.06.445(c) confidential status. In addition, Harvest Alaska and the BP Entities' Order 17 compliance filings, above referenced, were filed as confidential under AS 42.06.445(c); and it is reasonable to assume that the Applicants will continue to make such confidential compliance filings in the future.

Over the past 21 years, the RCA has also historically and repeatedly adopted erroneous interpretations of AS 42.06.445(c) in other dockets.[168] As a direct result of the

---

[167] *Anchorage Daily News* at 588 (quoting *Hays* at 834).

[168] For example, *see* Order 76 (2000 WL 36271342 (Alaska P.U.C.), link: ViewFile.aspx (alaska.gov); Order Finding Document Confidential and Affirming Electronic Ruling, RCA Order P-04-011(1), June 23, 2004, link: ViewFile.aspx (alaska.gov); Order Granting Petitions for Confidential Treatment, RCA Order P-08-009(22)/ P-08-013(19)/

AS 42.06.445(c)-based confidentiality orders issued by the RCA, persons interested in Commission administrative proceedings have been denied rights to have access to documents that may not otherwise have been held confidential. As a result of such denials, those interested persons have been denied due process, including the right to be informed and to meaningfully participate in proceedings before that agency. Not only are the disputed issues raised in these consolidated appeals capable of repetition, but they have actually been repeated.

2. Whether the Mootness Doctrine, if Applied, May Repeatedly Circumvent Review of the Issue.

If the Dismissal Order stands, the events that have unfolded in Docket P-19-017 and this appeal proceeding will likely cause the repeated circumvention of the matters under review. Notwithstanding the fact that Valdez (and others) requested that pivotal documents not be held as confidential and that the RCA hold an evidentiary hearing regarding the important and controversial issues presented in Docket P-09-017, the RCA did not heed those requests. After appealing Order 6, Valdez requested expedited treatment of its appeal on two occasions but was denied each time. Thus, the Order 6 appeal was relegated to typical appeal timing that could not have reasonably been expected to be resolved, and was not resolved before Order 17 was issued. Furthermore, the Dismissal Order dooms Valdez's timely Order 17 appeal to have been mooted as of the December 18, 2020, closing date of the BBPA-Harvest Alaska transaction, which was prior to the filing of the appeal

---

P-09-005(19)/ P-09-006(19)/ P-09-010(8)/ P-09-012(8)/ P-09/015(8)/ P-10-005(8), Oct. 26, 2010, link: Pleading (alaska.gov)

and prior to the appeal filing deadline. Thus, if the Dismissal Order stands and the mootness doctrine is applied, BBPA and Harvest Alaska's closing of the transaction within only a few days after Order 17 was issued, effectively mooted the Order 6 and 17 appeals. This is similar to the conclusions of the *Anchorage Daily News* court on this factor, finding that "it is possible for document request cases repeatedly to evade review by application of the mootness doctrine, since time is of the essence in release cases and orders by the superior court will normally be enforced prior to review by this court."[169] The mootness doctrine, if applied, will repeatedly circumvent review of the issues raised.

3. Whether the Issues Presented Are So Important to the Public Interest as to Justify Overriding the Mootness Doctrine.

The issues presented in the Order 6 and Order 17 appeals relate to the fundamental statutory and constitutional rights of Valdez and interested persons to have access to documents and information filed with public agencies and the right to meaningfully participate in proceedings such as those conducted by the RCA in Docket P-19-017. For example, under AS 42.06.445(a) and AS 40.25.110(a) (part of the Alaska Public Records Act), the general rule requires access to documents filed with public agencies.[170] The right to such access, as well as the right to participate in hearings, have been determined by

---

[169] *Anchorage Daily News* at 588.

[170] AS 42.06.445(a) ("Except as provided in (b) and (c) of this section, or prohibited from disclosure under state law, records in the possession of the commission are open to public inspection at reasonable times"); AS 40.25.110(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.").

Alaska and U.S. Courts to be "fundamental."[171] The Alaska Supreme Court recently stated: "We have acknowledged that the Public Records Act 'articulate[s] a broad policy of open records' and that the right of citizens to access public records is 'fundamental.'"[172] And, while the Public Records Act contains exceptions to the mandate of public disclosure, any exceptions are narrowly construed "[t]o further the legislative policy of broad public access."[173] More specifically, the Alaska Supreme Court has stated:

> The cornerstone of a democracy is the ability of its people to question, investigate and monitor the government. Free access to public records is a central building block of our constitutional framework enabling citizen participation in monitoring the machinations of the republic.[174]

Thus, it is proper to label the rights that Valdez seeks to enforce in these consolidated appeals as "so important to the public interest as to justify overriding the mootness doctrine." Like the findings of the Court in *Anchorage Daily News* on this third element of the public policy exception to mootness, "the questions presented here are of considerable public importance."[175]

As set forth above, all the elements of the public-policy exception to the mootness doctrine are present in these consolidated appeals, and the Court should apply that exception to permit the Order 6 and Order 17 appeals to proceed.

---

[171] *City of Fairbanks*, at 494-497, (citing *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292 (1937)).
[172] *Basey* at 533-34 (Alaska 2020) (citing *Gwich'in*, 10 P.3d at 578 (quoting *Kenai Peninsula Newspapers*, 642 P.2d at 1323-24).
[173] *Gwich'in,* at 578.
[174] *Jones v. Jennings*, at 735. *See also, Fuller, at* 1062 (citing *Jones v. Jennings*).
[175] *Anchorage Daily News* at 588.

B. The Collateral Consequences Doctrine Is Applicable to Defeat Mootness.

Alaska Courts have also recognized an exception to mootness known as the "collateral consequences doctrine" which is applicable if the results of the underlying matter carry indirect consequences that will continue to exist if the appeal is dismissed on mootness grounds. For example, in the case of *In Re Joan K*, 273 P.2d 594 (Alaska 2012), the Alaska Supreme Court considered the validity of a 30-day mental health-based commitment order. In that case, the appellant successfully contended that – even though the time-limited commitment order had expired thereby subjecting her appeal to dismissal due to mootness – social stigma, adverse employment restrictions, application in future legal proceedings, and restrictions on the right to possess firearms are recognized consequences from involuntary commitment orders.[176] In response, the *Joan K* Court agreed that the collateral consequences doctrine[177] was applicable in that case.[178]

Thus, the collateral consequences doctrine allows courts to decide otherwise moot cases when "a judgment may carry indirect consequences in addition to its direct force,

---

[176] *Joan K*, 273 P.2d at 597 (citations omitted).

[177] *Peter A. v State*, 146 P.3d 991 (Alaska 2006) also discusses the collateral consequences doctrine, and at 994-95 cites to and summarizes several Alaska cases in which the doctrine has been considered, including *E.J. v. State*, 471 P.2d 367, 368-70 (Alaska 1970), *Graham v. State*, 633 P.2d 211, 213 (Alaska 1981), and *Martin v. Dieringer*, 108 P.3d 234, 236 (Alaska 2005).

[178] *Joan K*, 273 P.2d at 597-98 ("We have previously recognized that the collateral consequences doctrine "allows courts to decide otherwise-moot cases when a judgment may carry indirect consequences in addition to its direct force, either as a matter of legal rules or as a matter of practical effect." Both Joan and the State have articulated sound reasons to adopt the doctrine, at least to some extent, in the involuntary commitment order context. We conclude that there are sufficient general collateral consequences, without the need for a particularized showing, to apply the doctrine in an otherwise-moot appeal from a person's first involuntary commitment order.").

either as a matter of legal rules or as a matter of practical effect."[179] The facts relevant to Valdez's appeal of Orders 6 and 17 provide grounds for the application of the collateral consequences doctrine to overturn the Dismissal Order and to continue with these appeals. If the Dismissal Order is permitted to stand due to mootness, the RCA's Order 6 interpretation and application of AS 42.06.445(c) will continue to apply, not only to the compliance filings to be made under Order 17 but also generally to RCA filings made by others in pipeline-related proceedings. If the Order 6 and 17 appeal issues raised by Valdez are not adjudicated, Valdez and the Alaska public will continue to be deprived of access to documents that could otherwise be available to the public. These collateral consequences compel this Court to reconsider its Dismissal Order and allow these appeals to continue.

VI. BPPA AND HARVEST ALASKA ACTED AT THEIR OWN PERIL BY CLOSING THE TRANSFER TRANSACTION WHILE THE ORDER 6 APPEAL WAS PENDING AND BEFORE THE ORDER 17 APPEAL PERIOD HAD RUN

The suggestion in the RCA's Motion to Dismiss that BPPA and Harvest Alaska relied upon the RCA's Order 17 decision to close their transaction[180] is not factually supported in the record and, even if factually supported, is wholly irrelevant to resolving the RCA's claims of mootness.[181] The RCA's approval is required to transfer a CPCN. Since BPPA and Harvest Alaska choose to close the transaction before there was a final,

---

[179] *Id.*

[180] RCA Motion to Dismiss at 5-6, "In reliance on the RCA's unstayed final decision, the larger transaction between the applicants has closed.' [Exc. 233-34].

[181] Reliance does not enter into a proper mootness analysis. Nevertheless, reliance must be reasonable, and moving forward and closing a transaction without regulatory approval in the form of a final, non-appealable order is far from reasonable reliance.

non-appealable order approving the Application for Transfer, they assumed the risk that an appeal may ultimately result in the denial of the transfer or the imposition of additional conditions to the transfer to better protect the public interest. The Applicants' decision to close the transaction simply means they have chosen to accept the risks associated with closing a transaction before receiving a final, non-appealable order approving the transfer.

Prior to the time that the Applicants elected to close their transaction, they were fully aware that (a) Order 6 had been appealed and was then pending before the superior court, and (b) Order 17 was subject to appeal for the thirty 30-day period following its issuance.[182] Therefore, with this knowledge, Applicants assumed the risk of closing their transaction before these appeals were fully and finally resolved.[183] Simply stated, the Applicants closing of a commercial transaction does not exempt them or their transaction from the constitutional and statutory rights of Alaskans.

CONCLUSION

The Dismissal Order should be reversed through holdings by this Court that (1) Valdez has standing to appeal Order 17, (2) Valdez exhausted its administrative

---

[182] Order 17 at 106 [Exc. 221]. ("This order constitutes the final decision in these proceedings. This decision may be appealed within thirty days of this order in accordance with AS 22.10.020(d) and Alaska Rule of Appellate Procedure 602(a)(2).")

[183] Common commercial practice is not to close a transaction before receiving the necessary regulatory and governmental approvals in the form of final, non-appealable orders. It would be extremely unlikely that the underlying transactional documents did not anticipate approvals in the form of final, non-appealable orders. Ironically, the terms of the transaction in this case are held confidential, so there is no way to know whether or not the applicants' decision to close the transaction before it has been approved by a final and non-appealable order represents any substantial unanticipated risk by the applicants.

remedies, or exhaustion was excused, and (3) the Order 6 and Order 17 appeals are not moot or, if moot, fall within an exception to mootness.

DATED this 15th day of December, 2021.

BRENA, BELL & WALKER, P.C.
Attorneys for Appellant, City of Valdez

By *//s// Robin O. Brena*
Robin O. Brena, ABA No. 8410089
Anthony S. Guerriero, ABA No. 8509132
Laura S. Gould, ABA Bar 0310042