**IN THE SUPREME COURT OF THE STATE OF ALASKA**

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| City of Valdez,<br><br>Appellant,<br><br>v.<br><br>Regulatory Commission of Alaska, Hilcorp Alaska, LLC, Harvest Alaska, LLC, Harvest Midstream I, L.P., Hilcorp Energy I, L.P., Hilcorp Energy Company, BP Pipelines (Alaska) Inc., and BP Corporation North America Inc.,<br><br>Appellees. | ) | Supreme Court No. **S-18178** |

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

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE CATHERINE EASTER

# BRIEF OF APPELLEE REGULATORY COMMISSION OF ALASKA


TREG R. TAYLOR
ATTORNEY GENERAL

*/s/ David A. Wilkinson*
David A. Wilkinson (1211136)
Robert Kutchin (2011113)
Assistant Attorneys General
Department of Law
1031 West Fourth Avenue, Ste. 200
Anchorage, AK 99501
(907) 269-6612



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By: Kaitlin D'Eimon
Deputy Clerk

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**Alaska Statutes:**

### AS 42.06.240. Certificate required; special requirements for North Slope natural gas

(a) After January 1, 1974 a pipeline carrier, or person that will be a pipeline carrier upon completion of any proposed construction or extension, may not engage in the transportation of oil or gas by pipeline subject to the jurisdiction of the commission, or undertake the construction or extension of any pipeline facilities for that purpose, or acquire or operate any pipeline facilities or extension, unless there is in force with respect to that pipeline carrier a certificate of public convenience and necessity issued by the commission authorizing those acts or operations. A certificate shall describe the nature and extent of the authority granted in it, including, as appropriate for the services involved, a description of the authorized area and scope of operation of the oil or gas pipeline facility.

. . . .

(d) The commission may attach to certificates of convenience and necessity terms and conditions and require issuance of securities it considers necessary for the protection of the environment and for the best interest of the oil or gas pipeline facility and the general public. . . .

### AS 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.

### AS 42.06.445. Public records

(a) Except as provided in (b) and (c) of this section, or prohibited from disclosure under state or federal law, records in the possession of the commission are open to public inspection at reasonable times.

(b) The commission may, by regulation, classify records submitted to it by regulated pipeline carriers or pipelines as privileged records that are not open to the public for inspection. However, if a record involves an application or tariff filing pending before the commission, the commission may release the record for the purpose of preparing for or making a presentation to the commission in the proceeding if the record or information derived from the record is considered by the commission to be relevant to an issue in the

proceeding, and if the record or information will be used by the commission in the proceeding. A record or information that the commission releases under this subsection may be released only after giving to the party that filed the record or information reasonable notice of its intention to release the record or information and opportunity to object to that release.

(c) A document filed with the commission that relates to the finances or operations of a pipeline subject to federal jurisdiction and that is in addition to or other than the copy of a document required to be filed with the appropriate federal agency is open to inspection only by an appropriate officer or official of the state for relevant purposes of the state.

(d) A person may make written objection to the public disclosure of information contained in a record filed under the provisions of this chapter or of information obtained by the commission or by the attorney general under the provisions of this chapter, stating the grounds for the objection. When an objection is made, the commission shall order the information withheld from public disclosure if the information adversely affects the interest of the person making written objection and disclosure is not required in the interest of the public.

(e) A commissioner may certify as to all official records of the commission under this section and may certify as to all official acts of the commission under this chapter.

(f) In this section, "record" means a report, file, book, account, paper, or application, and the facts and information contained in it.

**Alaska Regulations:**

**3 AAC 48.045. Procedure to classify records as confidential.**

(a) A person wishing to protect a record filed with, served upon, or otherwise made available to the commission must file with the commission a petition identifying the record to be protected and setting out good cause, including facts, reasons, or other grounds, for the commission to classify that record as confidential. If, at the time of filing, the person wishes to protect a record under this section, that person must stamp or otherwise mark the record as "confidential," and must file that record separately from any public record. If a person wishes to protect a record that has already been filed with the commission, that person must file a request with the commission to have that record marked as "confidential" and filed separately from any public record. A person may not file electronically any confidential record, and any document electronically filed with the commission is a public record in accordance with AS 42.05.671(a) and AS 42.06.445(a). The commission will reject an electronic filing, without releasing it as a public record, if the filing plainly contains confidential information. However, nothing in this subsection requires or imposes a duty on the commission to screen a filing for confidential information, and the commission will not screen a filing for confidential information.

(b) Good cause to classify a record as confidential under this section includes a showing that

(1) disclosure of the record to the public might competitively or financially disadvantage or harm the person with confidentiality interest or might reveal a trade secret; and

(2) the need for confidentiality outweighs the public interest in disclosure.

(c) A person who opposes a petition filed under (a) of this section may file a statement of opposition to the petition within five days of the filing of the petition with the commission. The statement must set out the facts and reasons why the record under consideration should not be classified as confidential.

(d) Unless the public interest or considerations of justice require expedited action, the decision of whether to grant or deny a petition to classify a record as confidential, in whole or in part, will be issued by the commission within 30 days following the filing of the petition.

(e) Pending the commission's action on a petition filed under (a) of this section, the record identified in the petition will be treated as confidential.

(f) Upon a determination by the commission that good cause exists under (b) of this section, an order will be issued by the commission that classifies the record as confidential and restricts access to the record or sets out other reasonable terms or conditions regarding access to it.

**3 AAC 48.047. Denial of petition to classify records as confidential.**

(a) If the commission denies a petition filed under 3 AAC 48.045, the commission will notify the petitioner and any person opposing the petition of the commission's determination to deny the petition.

(b) Within seven days following service of notice of a determination denying the petition, the petitioner may

(1) petition for reconsideration; or

(2) petition to withdraw the record.

(c) If neither reconsideration nor withdrawal of the record is requested, the record becomes public at the end of the seven-day period prescribed in (b) of this section.

(d) If reconsideration or withdrawal of a record is requested under (b) of this section and the request is denied by the commission, the commission will notify the petitioner and the record becomes public on the date set out in the commission's order denying reconsideration or withdrawal.

(e) If a petition for reconsideration or for withdrawal is granted, the commission will issue an order in accordance with 3 AAC 48.045(f).

**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.

(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 48.130. Formal complaints, protests and investigations.**

(a) A formal complaint or protest shall be in writing and should

(1) be so drawn as to fully inform the respondent or respondents and the commission as to how applicable provisions of the utility's or pipeline carrier's effective tariff or of the governing law, rules, regulations, or order of the commission have been, are being, or will be violated by the acts or omissions in question;

(2) set forth concisely, and in plain language, the facts and circumstances on which the complaint or protest is predicated;

(3) state the relief sought by the complainant;

(4) comply with 3 AAC 48.090 - 3 AAC 48.100.

(b) The commission may allow a formal complaint or protest to be supplemented because of facts arising subsequent to the original filing.

(c) Unless the commission orders otherwise, the answer to a complaint or protest shall be filed 20 days from the filing date of the complaint. Formal complaints or protests will be set for hearing at the earliest convenience of the commission, unless notice of satisfaction of the complaint, by answer or otherwise, is received by the commission within 20 days after the complaint or protest is filed. If satisfaction of the complaint has been made, the

commission will notify the complainant or protestant thereof and take appropriate action thereon.

(d) Two or more grounds of complaint or protest concerning the same subject matter may be included in one pleading, but should be stated and numbered separately. Two or more complainants or protestants may join in one pleading if their respective causes of action are against the same person, and deal with substantially the same alleged tariff infraction or violation of a law, rule, regulation or order of the commission.

(e) If a complaint or protest is made concerning a utility or pipeline carrier operated by a receiver or trustee, both the utility and its receiver or trustee must be named as respondents in cases involving the utility or pipeline carrier.

(f) A formal investigation will not be instituted on complaint, except for good cause shown to the commission's satisfaction by the complainant. The commission will rule on whether good cause exists to institute an investigation within 30 days after an answer to the complaint has been filed with the commission as provided for under (c) of this section. The commission will extend that deadline if amended or supplemental pleadings are filed. In that event, the deadline for commission ruling is 30 days after the final amended or supplemental pleading is filed.

(g) If a formal investigation or "show cause" proceeding is instituted by the commission on its own motion, the order instituting the investigation or proceeding shall clearly state the facts, circumstances, and allegations on which it is predicated.

(h) If a formal investigation is instituted under (f) or (g) of this section, the commission will rule on the matter within 60 days after the hearing is concluded or the evidentiary record is closed, whichever occurs later.

(i) The commission will extend the period for action set out in (h) of this section for good cause. The commission will set out its findings on good cause in an order extending that period.

**3 AAC 48.155. Rights and obligations of parties.**

. . . .

(b) Unless otherwise ordered, directed, or excused by the commission, a party to a proceeding has the duty or obligation to

(1) respond to discovery;

(2) meet all filing deadlines prescribed by the commission in a timely manner;

(3) attend and participate fully in hearings or pre-hearing conferences, or other proceedings at the time scheduled by the commission;

(4) be prepared to go forward with the presentation of its affirmative or direct case or with the examination or cross-examination of witnesses in a timely, reasonable, and professional manner;

(5) produce, in a timely manner, the documents, information or other data or materials required or requested by the commission;

(6) share in proportion, and timely pay, any costs allocated by the commission under AS 42.05.221, 42.05.401(b), 42.05.651 or AS 42.06.610, and 3 AAC 48.157.

(c) Unless otherwise ordered, directed, or excused by the commission, failure to meet or comply with commission requirements established by statute, regulation, or order may result in the forfeiture of any or all of a party's rights.

**3 AAC 48.625. Pipeline carrier application.**

(a) In addition to any other information or requirement specified by 3 AAC 48.600 - 3 AAC 48.660, a person requesting a right, power, privilege, or authority provided for in AS 42.06 shall file an application with the commission. An application must be in writing, and verified under oath by the applicant. Except as provided in (b) of this section, must contain:

(1) the names of applicants, business mailing addresses, electronic mail addresses, and contact telephone numbers;

(2) the name and address of the operator of the pipeline, if different from the applicants;

(3) a clear and concise statement of what right, power, privilege, or authority is being requested;

(4) the statutory or regulatory citation authorizing the right, power, privilege, or authority requested;

(5) a detailed description of the proposed service to be offered or discontinued, and the pipeline or facility to be constructed, operated, extended, expanded, interconnected, acquired or abandoned or otherwise modified, including

(A) a United States Geological Survey topographic map or other map of similar quality showing the pipeline route, exact location of the pipeline facilities, and receipt and delivery points;

(B) a description of the length and diameter of the pipeline;

(C) a statement of the pipeline's capacity and projected life; and

(D) copies of all pipeline right-of-way agreements or, if right-of-way agreements are not finalized, copies of the most current right-of-way applications;

(6) for new construction, the estimated system cost, annual operating expenses, description of financing arrangements, and projected rates;

(7) for new construction, transfers of certificates of public convenience and necessity, or transfers of controlling interest,

(A) a description of the ability and willingness of one or more applicants to provide the proposed services;

(B) for existing businesses, the applicants' most recent audited financial statements for the two most recent fiscal years preceding the date of the application;

(C) for new businesses, the audited financial statements for the two most recent fiscal years preceding the date of the application, of the entities that hold ownership interests; or

(D) if the audited financial statements required in (B) or (C) of this paragraph are unavailable, a request that the requirements of (B) or (C) of this paragraph be waived; a request for a waiver under this subparagraph must include

(i) a certification that independent audits are not performed;

(ii) financial statements consisting of, at a minimum, comparative balance sheets, income, and cash flow statements for the two most recent fiscal years preceding the date of the application, verified and certified for accuracy; and

(iii) a description of how the public convenience and necessity requires the service;

(8) the names, addresses, and percentage ownership of owners holding five percent or more;

(9) the names and addresses of the applicants' affiliated interests;

(10) the location in this state where the applicants' books, accounts, papers, and records will be held as required by AS 42.06.430(5);

(11) the names, titles, resumes, and responsibilities of key management employed or to be employed by the applicants;

(12) if a substantial change or modification is contemplated in a pipeline or facility, a detailed description and analysis of the projected change in facilities, service, and transportation rates;

(13) the names of persons that may be affected if the application is granted; and

(14) a statement from a company official authorizing the commission to notice the application.

(b) If information satisfying the requirements of (a)(5) - (12) of this section is filed with a previous application submitted under this section, the applicant may reference that information and need not restate the information.

(c) The commission will provide notice of the application by hand, by United States mail or a similar delivery service, or by electronic mail to each person who

(1) has filed a request for notice of applications; or

(2) the commission believes is interested in the proposed application.

(d) The commission will rule on an application filed under this section in accordance with the timelines set out in 3 AAC 48.661, including extensions of those timelines for good cause. The commission will set out findings on good cause in an order extending the deadline.

**3 AAC 48.645. Applications: notice, deadline for filing competing applications; public hearing.**

(a) An application for a certificate of public convenience and necessity; for an amendment to a certificate; for discontinuance, abandonment, or suspension of a service, facility, or route in whole or in part; for transfer of a certificate of public convenience and necessity; or for the authority to acquire or dispose of a controlling interest in a certificated public utility or pipeline carrier under AS 42.05.281 or AS 42.06.305; or any other application described in 3 AAC 48.625 and 3 AAC 48.640(a), will be noticed by the commission to the public in substantially the same manner and format as a tariff filing is noticed to the public under 3 AAC 48.220 and 3 AAC 48.280 - 3 AAC 48.290. If an application for a certificate, for an amendment to, or transfer of, a certificate, or for authority to acquire a controlling interest in a certificated utility or pipeline carrier, is filed by a utility or pipeline carrier that is not subject to economic regulation by the commission, the public notice will state that fact, define the meaning of the term "economic regulation," and place the public on notice by explaining that, with respect to this applicant, the commission has no jurisdiction over matters that constitute economic regulation. The notice will cite the applicable statute, regulation, or other authority, under which the applicant is exempt or claims exemption from economic regulation.

(b) Except as to notices of applications for transfer of a certificate of public convenience and necessity or applications for authority to acquire a controlling interest in a certificated public utility, the notice issued under (a) of this section will invite comment from interested members of the public. The notice will also announce that a person who proposes to file an application to furnish the same, or substantially the same, service or facility to essentially the same service area or route, in whole or in part, thus creating the potential for mutually exclusive applications must file within 30 days after the date the original application is noticed to the public, a notice of intent to file a competing application. The person must then file the competing application within 90 days after the date the original application was noticed to the public. If no notice of intent to file a

competing application is filed within the 30-day period following public notice, the commission will proceed to grant or deny the application for a certificate filed by the original applicant in accordance with the applicable provisions of AS 42.05.221 - 42.05.281 or AS 42.06.240 - 42.06.280.

(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.

(d) For good cause shown, the commission will, in its discretion, modify the time periods prescribed in (b) of this section and permit supplements to initial applications.

**3 AAC 48.648. Complete applications.**

(a) The provisions of this section apply to applications subject to timelines under AS 42.05.175 and to pipeline applications filed under 3 AAC 48.625.

(b) An application is complete when filed with the commission unless the application

(1) is rejected by the commission under 3 AAC 48.650(a) within the 15 business days after the date the application was filed;

(2) is accompanied by a request, described in (c) of this section, for waiver of a filing requirement, and the waiver request is subsequently denied;

(3) is accompanied by a petition, described in (d) of this section, for confidential treatment that is subsequently denied, and the records filed under seal are withdrawn under the procedures stated at 3 AAC 48.047; or

(4) does not include a proposed public notice of the application that complies with (e) of this section.

(c) For the purposes of (b)(2) of this section, an applicant requesting a waiver of any filing requirement must file a separate motion for waiver, accompanying the application, in compliance with the filing requirements of 3 AAC 48.805. An interested person wishing to file a response to a waiver request must file that response with the commission by the end of the public comment period. The applicant requesting the waiver wishing to file a reply to the response must file that reply with the commission within the five business days after the end of the public comment period. The commission will by order grant or deny the waiver request within 30 days after the end of the public comment period. An application accompanied by a waiver request is

(1) complete on the date the application is filed if all requested waivers of application filing requirements are granted and all other filing requirements are met; or

(2) rejected without prejudice to refiling if any requested waiver of a filing requirement is denied.

(d) For the purposes of (b)(3) of this section, an applicant requesting confidentiality on any component of an application must file a separate petition for confidential treatment, accompanying the application, in compliance with 3 AAC 48.045. An interested person wishing to file an opposition to the confidentiality petition must file the opposition with the commission by the end of the public comment period. The applicant seeking confidential treatment wishing to file a reply to the opposition must file that reply with the commission within the five business days after the end of the public comment period. The commission will by order grant or deny the confidentiality petition within 30 days after the end of the public comment period. An application accompanied by a petition for confidential treatment is

(1) complete on the date the application was filed if the confidentiality petition is granted and all other filing requirements are met;

(2) complete on the date the application was filed if the confidentiality petition is denied, the confidentiality proponent does not request to withdraw the record, and all other filing requirements are met; or

(3) rejected without prejudice to refiling if the confidentiality petition is denied and the commission grants a petition to withdraw the record under 3 AAC 48.047.

(e) An applicant shall file a proposed notice of the application with the commission, along with a purchase order reflecting that the applicant has arranged for publication of the notice in a newspaper of general circulation in this state. The notice must comply with 3 AAC 48.645 and contain

(1) a general description of the service proposed by the application;

(2) a request that interested parties file public comments with the commission at the address specified in the notice;

(3) a deadline for the public comment period of 21 days from the date of publication of the notice;

(4) a statement indicating whether any motions for waiver or petitions for confidentiality will be filed with the application, along with a description of the information subject to the motion for waiver or petition for confidentiality;

(5) the physical and mailing address and telephone number of the applicant;

(6) the commission’s mailing address and website address;

(7) a statement that the commission has not determined whether the application is complete;

(8) a statement of the deadline for the commission to determine whether the application is complete; and

(9) a statement that the application will be available for review at the offices of the commission upon filing, along with a statement of the date that the application will be filed with the commission.

(f) Within five business days after the filing of an application and proposed notice, the commission will arrange for publication of the notice in a newspaper of general circulation in this state.

(g) In this section, "business day" means a day other than Saturday, Sunday, or a state holiday.

**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.

(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.

## PARTIES

The City of Valdez is the appellant. The Regulatory Commission of Alaska (RCA), Hilcorp Alaska, LLC; Harvest Alaska, LLC (Harvest); Harvest Midstream I, L.P.; Hilcorp Energy I, L.P.; and Hilcorp Energy Company, BP Pipelines (Alaska) Inc. (BPPA); and BP Corporation North America Inc. are the appellees.

## ISSUES PRESENTED

1. *Standing*. To have standing to appeal an agency decision, one must meaningfully participate in the agency proceedings and have a legally recognized interest that was harmed by the decision.[1] Here, Valdez was one out of hundreds of commenters but decided not to intervene, and its appeal asserts novel procedural rights that it failed to adequately raise to the agency. The only harm to itself that Valdez identifies would flow not from the RCA's decision, but from a pipeline operator's future negligence. Did the superior court correctly hold that Valdez lacks appellate standing?

2. *Exhaustion of Administrative Remedies*. Litigants generally must exhaust available administrative remedies before going to court.[2] Here, although Valdez filed public comments and one confidentiality opposition with the RCA, it failed to use several procedures that would have allowed the RCA to adjudicate its concerns, including steps to protest, intervene, seek a hearing, access records, or oppose confidentiality. Did the court correctly hold that Valdez failed to exhaust administrative remedies?

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1 *City of Kenai v. State, Pub. Utils. Comm'n*, 736 P.2d 760, 760 (Alaska 1987).

2 *Eufemio v. Kodiak Island Hosp.*, 837 P.2d 95, 98 (Alaska 1992).

3. *Mootness*. This Court rarely resolves cases when it cannot grant relief, because doing so would generate advisory opinions on abstract questions.[3] Here, Valdez did not seek to stay an RCA decision allowing pipeline operators to transfer a regulatory approval certificate, so the operators closed their transaction, and one left the state entirely. Valdez's appeal seeks confidential documents on the theory that seeing them could have enhanced its comments during the RCA proceedings. Did the court correctly conclude that Valdez's appeal is moot because it is now impossible to provide comments on an agency decision that was made in 2020 and cannot practically be reversed?

## INTRODUCTION

The RCA reviewed an application to transfer regulatory approvals related to the Trans Alaska Pipeline System from BPPA to Harvest. The transaction drew wide public interest and the RCA received over 300 comments, including some from Valdez. Valdez expressed concern about the transaction, but it never filed a protest or sought to intervene. With the application uncontested, it proceeded as a non-hearing matter.

As part of the application, Harvest, BPPA, and affiliated entities petitioned the RCA to treat a collection of financial statements as confidential. Valdez filed a comment opposing confidentiality for these financial statements. The RCA held the statements confidential, and Valdez appealed that order to the superior court. While Valdez's appeal was pending, the RCA continued its review of the uncontested application. As the review progressed, BPPA and Harvest petitioned for confidential treatment of additional

[3] *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167–68 (Alaska 2002).

documents, but Valdez did not oppose these petitions. In the end, after reviewing thousands of pages of documents, the RCA granted the transfer application and the parties' transaction closed. Valdez then filed a second appeal challenging the RCA's confidentiality rulings and other procedural aspects of the RCA's review of the transfer application. The superior court dismissed both appeals.

This Court should affirm for three reasons. First, Valdez lacked standing to appeal. Valdez had no direct interest in the Harvest–BPPA transaction, suffered no harm from the RCA's confidentiality decisions or from the non-hearing procedures, and failed to participate as anything more than one of hundreds of public commenters. Second, Valdez failed to exhaust administrative remedies. Valdez did not take advantage of any of the processes for having its concerns adjudicated by the RCA: it failed to file a protest, failed to move to intervene, failed to oppose numerous confidentiality petitions, and failed to request access to confidential documents. Third, Valdez's appeals are moot. Valdez could have avoided mootness by requesting a stay, but it did not, so the RCA approved the transfer application and the Harvest–BPPA transaction closed. This transaction cannot be undone to give Valdez access to documents and procedures that it never timely sought.

## STATEMENT OF THE CASE

### I. The RCA received an application to transfer regulatory approvals related to BPPA's interest in the Trans Alaska Pipeline System.

In August 2019, BP Alaska announced plans to sell its assets to Hilcorp.[4] The next month, BPPA (a BP Alaska affiliate) and Harvest (a Hilcorp affiliate) jointly applied for RCA approval to transfer BPPA's certificate of public convenience and necessity, BPPA's interest in the Trans Alaska Pipeline System (more than 48 percent of the pipeline and 47 percent of the Valdez Marine Terminal tankage), and all associated operating authority. [Exc. 378–79] The RCA opened Docket No. P-19-017 to review the transfer application.[5] [R. 84]

By statute, pipeline carriers need a certificate of public convenience and necessity from the RCA before they can transport oil or acquire and operate pipeline facilities.[6] Through these certificates, the RCA can impose terms, conditions, and securities to protect the environment, the best interests of the facilities, and the public interest.[7] Certificates cannot be transferred without RCA approval.[8]

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4 Alex DeMarban, *BP Will Sell all its Alaska Assets to Hilcorp*, ANCHORAGE DAILY NEWS, Aug. 28, 2019, https://www.adn.com/alaska-news/2019/08/27/bp-will-sell-all-its-alaska-assets-to-hilcorp/.

5 The RCA also opened dockets P-19-015 and P-19-016 to review additional applications related to the BP–Hilcorp transaction. [Exc. 16] Valdez has appealed only RCA decisions as they relate to P-19-017. [Exc. 371, 374, 495, 856]

6 AS 42.06.240.

7 AS 42.06.240(d).

8 AS 42.06.305.

The transfer process is relatively straightforward. When the RCA receives a written transfer application,[9] it opens a docket, gives notice to the public, and provides a window for comment.[10] The RCA then reviews the application based on materials supplied by the applicants and sometimes requests supplemental information.[11] By a motion, applicants may request that the RCA waive filing requirements.[12] They may also petition to keep confidential "any component of an application."[13] With both waiver and confidentiality requests, an "interested person" may file a response or opposition "by the end of the public comment period."[14] If only public comments are filed, the application proceeds as uncontested.[15] An "interested person," however, may file a protest of the application within the comment period.[16] If the protest includes the content required by regulation, including a petition to intervene, then the applicants must respond and, based on the protest and response, the RCA "will issue an order indicating whether there will be a hearing on the application."[17]

Harvest and BPPA's application proceeded without protest. [Exc. 778–79]

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9 3 AAC 48.625; 3 AAC 48.645.

10 3 AAC 48.645.

11 3 AAC 48.652; *see* 3 AAC 48.625 (listing requirements for pipeline carrier applications).

12 3 AAC 48.648(c).

13 3 AAC 48.648(d).

14 3 AAC 48.648(c), (d).

15 *See* 3 AAC 48.654 (requiring protest to contest matter).

16 3 AAC 48.654(a).

17 3 AAC 48.654(b), (e).

## II. The RCA reviewed Harvest's and BPPA's requests to treat certain records as confidential and accepted public comments.

Along with its application, Harvest and its affiliates Hilcorp Alaska, LLC, and Harvest Midstream I, L.P., petitioned for confidential treatment of six financial statements. [Exc. 1–13] The RCA issued a public notice and invited comments on the transfer application and responses to the confidentiality petition. [R. 84] The RCA extended the comment period twice. [Exc. 16, 754]

During these comment periods, the RCA received 191 written comments, with several opposing the applications and requesting that the RCA hold a public hearing. [Exc. 754–57] Among the comments were those filed by Valdez. [Exc. 20–28] Valdez urged the RCA to require Harvest to provide certain planning and financial information and make it publicly accessible. [Exc. 25–26] Valdez also commented that "the RCA should," among other things, "invoke its regulatory power to (1) set a specific deadline for the filing of petitions of interested persons to intervene into this proceeding; [and] (2) permit intervenors to participate in an evidentiary process to establish a complete record in this proceeding." [Exc. 26–27] Valdez indicated that it "intends 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 this docket." [Exc. 27] It also asserted that "Valdez and its citizens have substantial environmental, financial, and property interests affected by this proceeding that will weigh strongly in favor of the Commission's granting Valdez intervenor status." [Exc. 27–28]

While comments were being received, the RCA issued the first of what would be several orders seeking additional documents from the applicants. [Exc. 18] The RCA requested Harvest and BPPA's purchase and sale agreement, additional related contracts, corporate relationship charts, and the most recent two years of financial statements for two additional Hilcorp entities and BP Corporation North America, Inc. [Exc. 18–19]

This order drew several confidentiality petitions. BBPA and Harvest jointly petitioned for confidential treatment of their purchase and sale agreement. [Exc. 439] And BPPA, Hilcorp Energy I, L.P., and Hilcorp Energy Company petitioned for confidential treatment of the additional financial statements. [Exc. 30, 39–41]

The RCA then published notice of a public-input hearing to receive oral comments. [Exc. 51] The RCA explained that although it had "received numerous comments, no filing submitted within the comment period rose to the level of a protest that would trigger the 15-day period for [the RCA] to issue an order indicating whether there will be a hearing on these applications." [Exc. 54–55 (citing 3 AAC 48.654(c))] "[N]o commenter indicated they were submitting a protest or met the requirements for a protest." [Exc. 55] Still, the RCA determined that "given the importance of the transaction and the level of interest by the public," "some additional public process would be appropriate." [Exc. 55] The RCA summarized the issues that had been raised by commenters to date "to ensure those participating at our upcoming public input hearing are aware of prevalent themes in the comments filed before the end of the comment period." [Exc. 59–61]

In February 2020, the RCA held the public-input hearing. [Exc. 67] The RCA heard from 100 people and received written comments from 12 more. [Exc. 758] In oral comments, Valdez stated that it "would encourage [the RCA] to have a public hearing." [Exc. 70] After the close of the comment period and the public-input hearing, the RCA received 33 more written comments. [Exc. 759]

Later that month, in Order No. 5, the RCA granted the applicants' petition to keep the purchase and sale agreement confidential, but it requested more information about the financial statements. [Exc. 80] The RCA explained that AS 42.06.445 sets out exceptions to the rule that RCA records are open to public inspection. [Exc. 83] Generally, when an entity objects to disclosure, the RCA must protect the information if releasing it "adversely affects the interest of the person making the written objection and disclosure is not required in the interest of the public." [Exc. 83–84 (quoting AS 42.06.445(d))]. But the statute also specifically protects documents that are related to the finances of a federally regulated pipeline and not required to be filed with a federal agency. [Exc. 84 (citing AS 42.06.445(c); 3 AAC 48.040(b)(3))] The confidentiality petitions had focused only on the general, public-interest basis for confidentiality;[18] they had not addressed the federal-jurisdiction grounds. [Exc. 84] The RCA therefore asked the applicants for additional information, including "an explanation as to whether any of the submitted financial statements are required to be filed with a federal agency, and how and whether they relate to the finances or operations of the pipelines at issue." [Exc. 90–91]

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[18] *See* AS 42.06.445(d); 3 AAC 48.045(b).

Harvest and BPPA responded that the financial statements should be protected under the federal-jurisdiction rule. [Exc. 95–96] Valdez also responded. [Exc. 100] In its "Comments Re: Order 5," Valdez argued that Harvest and BPPA had waived the ability to assert confidentiality under AS 42.06.445(c), that the statute did not apply to the entities, and that public policy warranted a narrow reading of AS 42.06.445(c) and precluded its application. [Exc. 103–09] Harvest and BPPA objected to Valdez's comments, noting that they were filed 83 days after the close of the comment period and that the docket does not contemplate new filings by non-parties. [Exc. 474–75] Harvest and BPPA also noted that "Valdez had an opportunity to protest the application and seek to intervene before the public comment deadline but chose not to do so." [R. 740–41]

In Order No. 6, the RCA allowed Valdez's response. [Exc. 123] The RCA explained that it had "not yet determined" if it needed to hold an evidentiary hearing and that "the transfer requests in these dockets are presently non-hearing matters." [Exc. 123] And in a non-hearing matter, "any interested person may file documents authorized under 3 AAC 48.010 – 3 AAC 48.170 without first obtaining permission." [Exc. 123 (citing 3 AAC 48.110(a))] Construing Harvest and BPPA's responses to Order No. 5 as "a supplement to their petitions for confidential treatment," the RCA treated Valdez's comments as a statement in opposition to a petition for confidential treatment, which any person may file under 3 AAC 48.045(c). [Exc. 123]

On the merits of the confidentiality question, however, the RCA found Valdez's arguments unpersuasive. [Exc. 123–27] The RCA held that the financial statements were

exempt from disclosure under AS 42.06.445(c)'s protection for documents related to federally regulated pipelines. [Exc. 124–27]

## III. Valdez appealed the RCA's confidentiality ruling on twelve financial statements (Order No. 6).

In April 2020, Valdez filed a superior court appeal from the RCA's Order No. 6. [Exc. 371–73] Valdez challenged only the RCA's application of AS 42.06.445(c)'s confidentiality provisions to the financial statements. [Exc. 371–72]

The RCA, along with BPPA, Harvest, and their affiliated entities, moved to dismiss Valdez's appeal, explaining that Order No. 6 was not a final, appealable order. [Exc. 133–35, 153–54, 155–56] Valdez cross-moved to expedite the appeal. [Exc. 145] In a response, the RCA noted that Valdez had mistakenly inferred that public comment was the only means of participation; Valdez had ignored "the role of public comment, and conflate[d] public comment with party status." [Exc. 160] Moreover, while "applications for transfer of certificates of public convenience and necessity are routinely non-hearing matters," the RCA noted that "a person may request a hearing by filing a protest under 3 AAC 48.654." [Exc. 161–62] But nobody had. [Exc. 162] "Valdez, in common with any other member of the public, had the opportunity to request a hearing and party status but did not do so." [Exc. 162] Valdez also never asked the RCA for access to the confidential records. [Exc. 162–63 (citing 3 AAC 48.049(b))]

The superior court denied the RCA's motion to dismiss, holding that Order No. 6 was a final, appealable decision. [Exc. 168–171] The court also denied Valdez's motion

to expedite. [Exc. 172] The appeal of Order No. 6 remained pending as RCA proceedings on Harvest and BPPA's transfer application continued.

## IV. The RCA requested and received additional documents and confidentiality requests from Harvest and BPPA, Valdez objected to none of them, and the RCA granted the transfer application.

As the RCA proceedings on the transfer application progressed, the RCA continued to collect additional information from Harvest and BPPA.

In April 2020, the RCA asked Harvest and BPPA to answer questions related to operations; agency oversight; dismantlement, removal, and restoration obligations; and Hilcorp's financial fitness. [Exc. 131–32; 484–92] Harvest and BPPA petitioned for confidential treatment of several of their responsive filings. [Exc. 577; *see also* Exc. 628–29 (summarizing content subject to the confidentiality petition)] Valdez filed nothing in response. The RCA held the filings confidential under AS 42.06.445(c). [Exc. 175]

In June, the RCA again requested additional information, including documents related to an amended purchase and sales agreement, corporate guaranties, organizational information, and joint liability for major operating expenditures. [Exc. 620–23] Harvest and BPPA petitioned for confidential treatment of some of their responsive filings, including their second amendment to the purchase and sale agreement and financial assurance agreements. [Exc. 634, 637, 645] Harvest and BPPA separately petitioned for confidential treatment of financial statements attached to right-of-way transfer applications. [Exc. 663] Again, Valdez filed nothing in response.

In two orders, the RCA concluded that the public-interest balancing test for confidentiality under 3 AAC 48.045 protected the amendment to the purchase and sale

agreement and that AS 42.06.445(c) protected the financial assurance agreements and the financial statements attached to right-of-way transfer applications. [Exc. 195–99, 694] Following up on the right-of-way transfer applications, the RCA ordered Harvest and BPPA to provide any related federal or state decisions, as well as any "corporate guaranty, bond, or other form of security entered into in connection with the grant of those applications." [Exc. 201] If the security document would qualify for confidential treatment, the RCA allowed Harvest and BPPA to simply mark it as confidential under AS 42.06.445(c) without filing an additional petition. [Exc. 201] This too drew no response from Valdez.

As the application process progressed, Valdez filed only one additional document with the RCA: an "Informational Filing" attaching an article discussing Hilcorp Energy, I, L.P.'s Moody's corporate family rating. [Exc. 202]

On December 14, 2020, in Order No. 17, the RCA granted Harvest and BPPA's transfer application. [Exc. 214] In its discussion of the application process, the RCA explained that with no protests filed, it "evaluate[d] the application based on the information supplied with it and any supplemental information [it] request[ed] from the applicant." [Exc. 778] Although the RCA received extensive public comment, "none of the submittals . . . can be considered protests of the applications." [Exc. 779] The RCA found that Harvest was able and willing to hold the certificate of public convenience and necessity, that continued operation of the Trans Alaska Pipeline System is required by present and future public convenience and necessity, and that it is in the best interests of

the public to approve the transfer of BPPA's assets to Harvest. [Exc. 219] One week later, Harvest and BPPA closed their transaction. [Exc. 227–28]

## V. Valdez appealed the RCA's approval of the transfer (Order No. 17) and the superior court dismissed both appeals.

In its second superior court appeal from the RCA proceedings, Valdez challenged the approval of the transfer in Order No. 17 as well as the RCA's confidentiality rulings. [Exc. 856] Valdez asserted that by approving the transfer on what Valdez deemed "a secret record," the RCA had denied "citizens and interested persons foundational constitutional and statutory rights to have meaningful access to, oversight of, and the opportunity to meaningfully engage in the underlying administrative proceeding." [Exc. 374–75] It argued that Order No. 17 denied "free-speech rights"; that "not designating parties, not holding an evidentiary hearing on contested issues of fact, [and] keeping the record secret" denied "due process rights"; that "issuing Order 17 based upon a secret record" denied "an opportunity to properly appeal"; that "the RCA did not fully consider the public interest"; and that the RCA's interpretation of the confidentiality statute, AS 42.06.445(c), "violates several constitutional and statutory provisions and protections of the citizens of Alaska and interested persons." [Exc. 375–76] The superior court consolidated this with the pending Order No. 6 appeal. [R. 4895]

The RCA and the Hilcorp-affiliated entities moved to dismiss the consolidated appeals. [Exc. 229, 236] The RCA explained that "Valdez has repeatedly, continuously, and without excuse neglected to comply with the procedures necessary to invoke the administrative and judicial process in this situation" and that review on the merits would

be unnecessary and inefficient. [Exc. 229] The RCA argued that (1) Valdez lacked standing to appeal, (2) it failed to exhaust administrative remedies (by never filing a protest, moving to intervene, or requesting access to the confidential materials), and (3) the appeals were moot because the larger transaction had closed (and Valdez failed to seek a stay). [Exc. 229–34; *see also* Exc. 245–60]

After extensive briefing, the superior court dismissed the appeals. [Exc. 308; *see* Exc. 262–84; 287; 289–94; 296–303; 304–07] The court held that Valdez had standing to appeal Order No. 6 because it "proceeded to participate to a limited extent by filing comments responsive to Order 5 in which it asserted that the documents provided by the applicants were not entitled to confidentiality," but the "same cannot be said for Valdez's ability to appeal Order 17." [Exc. 316] The court highlighted that Valdez filed no objections "to any other documents" subject to confidentiality petitions and, with respect to the larger transaction, Valdez "never indicated any dispute or opposition to the transfer as a whole." [Exc. 316–17] Valdez's assertions that "Alaska citizens and the public" were deprived of participatory rights "in the abstract" did not show that Valdez was factually aggrieved by Order 17. [Exc. 317]

The court also held Valdez did not exhaust administrative remedies because it failed to move to intervene, failed to file a protest, failed to file a competing application, failed to oppose confidential treatment of any of the documents after Order No. 6, failed to seek access to confidential documents, and failed to "provide the RCA with any other meaningful indication that it believed the agency's procedures for receiving public input

were deficient." [Exc. 318] In short, the RCA "had no occasion to consider" Valdez's assertions that the proceedings were in any way inadequate. [Exc. 319]

Finally, since the transfer from BPPA to Harvest had "long since been effectuated" and Valdez never sought a stay, the court held the appeals were moot. [Exc. 320–21]

Valdez appeals.

## STANDARDS OF REVIEW

Whether a party has standing to appeal an agency decision "is a question of law, reviewable de novo."[19]

Whether exhaustion applies to a particular action is a legal question reviewed de novo.[20] If exhaustion applies, this Court "reviews for abuse of discretion a superior court's decision regarding whether a party has exhausted the administrative remedies available or whether the party's failure to exhaust remedies should be excused."[21]

This Court reviews mootness decisions de novo.[22]

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19 *City of Kenai v. State, Pub. Utils. Comm'n*, 736 P.2d 760, 762 (Alaska 1987) (italics omitted).

20 *State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 65 (Alaska 2001).

21 *Id*.

22 *Regul. Comm'n of Alaska v. Matanuska Elec. Ass'n, Inc.*, 436 P.3d 1015, 1027 (Alaska 2019).

## ARGUMENT

### I. Valdez lacks standing to appeal the RCA orders.

Administrative agencies often collect hundreds of comments, but only some commenters—those with standing—may appeal an agency's final decision.[23] [Exc. 754–57] There are good reasons for this. If every disgruntled commenter could appeal every agency decision, little would get done. And many appeals would lack "adversity[,] which is fundamental," because people with no concrete interest in an agency action could submit a one sentence comment and then appeal.[24] The Court avoids this by using a three-prong test to determine who has standing.[25] To have standing, someone must (1) be directly interested in the agency decision; (2) be factually aggrieved by the decision; and (3) have participated in the proceedings.[26]

The Court's reasoning in *City of Kenai v. State, Public Utilities Commission*—which explains this test—shows that Valdez does not have standing here. There, Homer Electric had contracted with Kenai to manage utility facilities.[27] Street construction then forced Homer Electric to move the facilities, and it argued that Kenai had to pay relocation costs under their contract.[28] When the Public Utilities Commission (RCA's predecessor) declined to hear the contract claim, Homer Electric requested a special tariff

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23 *City of Kenai*, 736 P.2d at 762.

24 *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976).

25 *See City of Kenai*, 736 P.2d at 762–63.

26 *Id.*

27 *Id.* at 760.

28 *Id.*

to offset the relocation costs, which required a hearing and commission approval.[29] Kenai filed comments opposing the tariff but declined the Commission's invitation to intervene.[30] To Kenai's later frustration, the final Commission decision abrogated a common-law rule allowing municipalities to "compel without reimbursement relocation of utility facilities" and effectively held Kenai liable for the relocation costs.[31] So Kenai filed a superior court appeal, which was dismissed for lack of standing mainly because Kenai had declined to intervene.[32]

Applying the three-prong standing test, this Court held that Kenai could appeal.[33] Under the first prong, Kenai had two direct interests at stake: the scope of its common-law authority and an economic interest in not paying relocation costs.[34] Under the second prong, Kenai was factually aggrieved because these interests were "adversely affected" by the Commission's decision: the Commission abrogated Kenai's common-law authority and effectively required it to pay relocation costs.[35] Under the third prong, Kenai had participated in the proceeding by filing detailed comments.[36] Kenai thus had standing to appeal the decision.

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29 *Id.* at 760–61.

30 *Id.* at 761.

31 *Id.* at 762.

32 *Id.*

33 *Id.* at 763.

34 *Id.* at 761.

35 *Id.* at 760, 763.

36 *Id.* at 763.

The situation here is much different, making Valdez's analogy to *City of Kenai* superficial. [At. Br. 23–32] Begin with the first and second prongs, a "legally recognized interest" that was "adversely affected" or "factually aggrieved" by the agency decision.[37] In *City of Kenai*, the Commission both abrogated Kenai's common-law authority and effectively forced it to pay money.[38] The Commission's decision thus adversely affected Kenai's interests in its own authority and pocketbook, which were unquestionably direct interests recognized by law. Here, by contrast, the RCA's decisions—to keep some documents confidential and approve the transfer—did not harm any direct interests of Valdez in any concrete way. These decisions did not shrink Valdez's authority, obligate it to pay money, compel Valdez to act, stop Valdez from acting, or otherwise harm Valdez.

Valdez argues that three of its interests were harmed, but none establish standing under *City of Kenai*.[39] [At. Br. 23–32]

First, Valdez argues that pipeline activity might—in the future—affect Valdez more than other members of the public. [*See* At. Br. 17] This may be true. But it is not a "direct" interest at stake that makes Valdez "factually aggrieved" by this agency decision. Unlike in *City of Kenai*, where the agency decision itself diminished Kenai's authority and required it to pay money, any harm to Valdez here is uncertain and contingent on third-party wrongdoing. For the *City of Kenai* test to mean anything, it must require more

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37 *Id.* at 760, 763.

38 *Id.*

39 The superior court distinguished between standing to appeal Order Nos. 6 and 17. [Exc. 315–17] But because Valdez did not have a direct interest that was harmed by either order, it cannot appeal either.

than such speculation, because nearly anyone can insist that an agency decision mixed with third-party wrongdoing may somehow harm them in the future. This is not enough to show a "direct" interest at stake in the agency decision, much less to show that one has *already* been "factually aggrieved" by the decision.

Second, Valdez argues that the decision harmed its interest in the RCA holding an evidentiary hearing. [At. Br. 28–30] But this is not a legally recognized interest, and Valdez thus was not factually aggrieved by the RCA's decision to review the transfer application as a non-hearing matter. No law requires the RCA to hold an evidentiary hearing before authorizing a certificate transfer. In fact, the RCA needs to consider whether to hold an evidentiary hearing only when there is a protest or a competing application, which no one filed.[40] Valdez asserts that a hearing is "required by law" but it provides no citation or analysis. [At. Br. 22] And for similar reasons, the RCA was not required to actively solicit Valdez's intervention. No statute requires the RCA to seek out interested parties, and Valdez ignored the procedures for becoming a party.[41] Valdez thus had no legally recognized, direct interest in participating at an evidentiary hearing.

Third, Valdez argues that the agency decision harmed its interest in viewing the financial documents before submitting comments. [At. Br. 26] But this is likewise not a legally recognized interest. Although Alaska law generally favors disclosure of public

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[40] *See* 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 . . . ."); 3 AAC 48.654(e) (providing that after receiving a protest, the RCA "will issue an order indicating whether there will be a hearing on the application").

[41] 3 AAC 48.654.

documents,[42] there are established statutory exceptions to this policy.[43] This Court has never held that public commenters have a constitutional or statutory right to view every document that an agency relies on in every non-hearing matter. And Valdez failed to request access under the RCA's procedures.[44]

The cases Valdez cites to support its asserted right to see all agency documents are distinguishable because they mostly involved protested hearings or court cases.[45] [*See* At. Br. 55, 61–62] When an agency is adjudicating protested matters in a hearing involving formal parties, the parties may have a due process right to probe evidence offered against them. But that does not mean that public commenters in a non-hearing application proceeding have those same rights. And even in protested hearings, the due process right requires only that the parties have access to the documents and only under an oath of confidentiality—it does not require public disclosure of the otherwise confidential

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42 AS 42.06.445(a); *see* AS 40.25.110.

43 *See, e.g.*, AS 40.25.140 (library records); AS 40.25.151 (retirement records); AS 40.25.100 (tax records); AS 42.06.445(b) (pipeline records).

44 3 AAC 48.049.

45 *See Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 298–99 (1937) (noting multiple protests and hearings); *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990) (involving court case); *City of Fairbanks v Alaska Pub. Utils. Comm.*, 611 P.2d 493–96 (Alaska 1980) (noting competing applications for same certificate and analogizing to quasi-judicial proceedings). Valdez does cite some cases that did not involve a protested hearing, which call the right to access public information "fundamental." But those cases did not involve release of confidential documents to a public commenter. *See Basey v. Dep't of Pub. Safety, Div. of Alaska State Troopers*, 462 P.3d 529, 531–32 (Alaska 2020) (not releasing records); *Fuller v. City of Homer*, 75 P.3d 1059 (Alaska 2003) (not involving public comment); *Gwich'in Steering Comm. v. State, Off. of the Governor*, 10 P.3d 572, 585–86 (Alaska 2000) (not releasing records).

documents.[46] Nor do general concepts of due process grant appellate standing to all public commenters—if this were so, the *City of Kenai* test would no longer guarantee the actual "adversity[,] which is fundamental" to standing.[47] [*See* At. Br. 55, 61–62]

Valdez also fails the third prong of the *City of Kenai* test because it did not sufficiently participate in the agency proceedings. Valdez submitted comments, which sufficed in the factual context of *City of Kenai*. [Exc. 20–28, 70–72, 100–11] But in this case it does not. When an agency has specific procedures for protesting complex transfer applications that implicate irreversible commercial transactions—and a person knowingly forgoes those protest procedures—merely filing comments cannot be significant participation for appellate standing.[48] Such a holding would allow people to avoid protesting, undermining the essential purposes of the protest process. Protesting puts applicants and the RCA on notice and requires formal responses.[49] It also triggers a framework for sharing the financial burden of increased administrative process.[50] Valdez should not be allowed to circumvent this important system by calling its public comments sufficient participation to support an appeal.

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46 *City of Fairbanks*, 611 P.2d at 497 ("[T]he Commission could have, consistent with the requirements of due process, imposed an order of confidentiality on Fairbanks' representatives . . . and sealed that portion of the record containing the privileged information.").

47 *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976).

48 *See* 3 AAC 48.110 (explaining protest).

49 3 AAC 48.654.

50 AS 42.06.610 (allowing allocation of fees among parties but not public commenters).

Not only are mere comments not enough in this context, but Valdez's comments themselves were insufficient. After submitting general comments, comments on the confidentiality of a set of financial statements, and offering an "Informational Filing" with a Moody's report, Valdez went silent. [Exc. 20–28, 70–72, 100–11, 202–13] It did not file comments on any of the several confidentiality petitions that followed Order No. 6 or in response to the many subsequent orders that preceded the RCA's final decision. [*See* Exc. 131–32, 175, 195–99, 201, 484–92, 577, 620–23, 628–29, 634, 637, 645, 663, 694] Given that Valdez could have filed responses to any of these orders,[51] many of which dealt with additional confidentiality petitions, Valdez's limited comments did not constitute participation under *City of Kenai*.

In the end, nothing distinguishes Valdez from every other commenter with respect to standing. The *City of Kenai* test turns on more than just filing a public comment, and it certainly does not mean that every commenter has standing to appeal every agency decision. The Court should hold that Valdez lacks standing and need not reach the other issues on appeal.

## II. Valdez failed to exhaust available administrative remedies.

Even if Valdez had standing, the superior court correctly decided that Valdez failed to exhaust administrative remedies. [Exc. 317–19] Requiring exhaustion serves the

[51] *See* 3 AAC 48.654(a) ("Before the close of the comment period, an interested person may file with the commission comments or a protest . . . ."). In this case, the RCA accepted a supplement to Valdez's initial comments that was filed 83 days after the comment period closed. [Exc. 123 (citing 3 AAC 48.110(a))]

"basic purpose" of allowing "an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies."[52] Here, by not pursuing various available avenues of redress at the agency level, Valdez gave the RCA no opportunity to adjudicate Valdez's nebulous constitutional assertions and challenges to the transaction itself; no opportunity to determine if Valdez should be afforded party status and an evidentiary hearing; and no opportunity to review objections to the confidentiality of any documents filed after Order No. 6. [*See* Exc. 374–76]

The exhaustion analysis requires examining (1) if exhaustion of remedies is required, (2) whether the complainant failed to exhaust those remedies, and (3) whether the failure to exhaust is excused.[53] Here, as the superior court correctly concluded, exhaustion was required and Valdez failed—without excuse—to pursue several available administrative remedies. [Exc. 317–19]

### A. Exhaustion was required.

Valdez does not appear to argue that exhaustion was not required here. [*See* At. Br. 33–46] And rightly so: "A claimant must generally exhaust administrative remedies before making a claim in court challenging the agency's decision-making procedures."[54] As the superior court correctly observed, "Valdez is seeking redress for an unperfected

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52 *Doubleday v. State, Com. Fisheries Entry Comm'n*, 238 P.3d 100, 107 (Alaska 2010) (quoting *Ben Lomond, Inc. v. Municipality of Anchorage*, 761 P.2d 119, 121–22 (Alaska 1988)).

53 *Id*.

54 *Id.*

administrative remedy: public access to the confidential documents." [Exc. 318] The same is true of Valdez's claim that the RCA should have held a hearing. [Exc. 375 ¶ 3]

"[O]nly the purest legal questions, requiring no factual context, are exempt from the exhaustion requirement . . . ."[55] Valdez's appeal does not raise pure legal questions; instead, it contests the RCA's application of confidentiality and procedural rules to the Hilcorp–BPPA transaction. [*See* At. Br. 15–22] Valdez therefore needed to exhaust its administrative remedies in the RCA before going to court.

### B. Valdez ignored several administrative remedies and was not excused from exhausting them.

Valdez argues that it "did all that it was required to do" at the agency level. [At. Br. 33] But simply filing public comments falls far short of exhausting the remedies that were available to Valdez. In the superior court, Valdez raised a series of issues it could have presented to the RCA through available agency procedures: it challenged the RCA's "process of not designating parties [and] not holding an evidentiary hearing on contested issues of fact" [Exc. 375 ¶ 3]; objected to the RCA's confidentiality rulings (asserting unspecified constitutional and statutory harm flowing from those rulings [*see* Exc. 371–72 ¶¶ 1–7; 374–76 ¶¶ 1–4, 6]); and claimed that the RCA's ultimate transfer approval did not consider the public interest. [Exc. 376 ¶ 5] Valdez could have—and should have—raised these issues before the RCA by protesting and moving to intervene, opposing confidentiality applications, and requesting access to confidential records. And by instead rushing to appeal, Valdez deprives the RCA of the opportunity to exercise its authority

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55 *Id.*

over confidentiality, protests, and interventions in the first instance and deprives the courts of the record needed to evaluate the agency's exercise of its discretion.[56]

### 1. Protesting and intervening

Applications to transfer certificates of public convenience and necessity are routinely non-hearing matters.[57] An interested person may request party status and a hearing, but not by just filing comments asserting that the RCA "should . . . allow intervening parties to participate in a hearing to fully develop a record." [Exc. 27] Instead, a person who wants a hearing must file a protest as set out in 3 AAC 48.654, formally articulating their concerns, seeking intervention, and requesting a hearing.[58]

Valdez has no viable excuse for failing to do this. It asserts that it did not seek to intervene because the "RCA never invited intervention petitions and did not establish a deadline to file petitions to intervene." [At. Br. 34] But this was not necessary because the process for requesting intervention is in regulation: a protest necessarily includes "a petition to intervene," and the regulations explain how and when to file a protest.[59]

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56 *See* AS 44.62.570(e) (allowing courts to modify, remand, or affirm agency decisions but only "without limiting or controlling in any way the discretion legally vested in the agency").

57 *See* AS 42.06.305 (requiring RCA approval for certificate transfer between pipeline carriers but not mentioning a need for contested evidentiary hearings); 3 AAC 48.648 (setting out procedures for dealing with complete applications, including procedures for waivers and confidentiality petitions, and timeline for public notice); 3 AAC 48.661(c) (requiring RCA to rule on a transfer application within six months).

58 3 AAC 48.654(b).

59 *Id.*

Valdez also claims that filing comments had the same effect as a protest and that these are just "alternative approaches." [At. Br. 36] But that is wrong. A protest would have required Valdez to set out the specific grounds for its objections to the underlying transaction.[60] That would have provided Harvest and BPPA with notice of how to mitigate Valdez's concerns.[61] It would have given them an opportunity to respond to Valdez's allegations.[62] It would have would have presented the RCA with conditions it could have imposed to satisfy Valdez.[63] It would have required the RCA to decide whether there should have been an evidentiary hearing, or whether to independently institute a formal investigation, both discretionary decisions that call on the RCA to determine the existence of good cause and weigh the public interest.[64] And it would have allowed the RCA to rule on Valdez's party status, a decision likewise vested in the RCA's discretion, which would have developed a record on Valdez's interests in the proceedings.[65] Moreover, had Valdez sought and been granted intervention and a hearing,

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60 *Id.*

61 *Id.*

62 3 AAC 48.130(c) (allowing answer to a protest), .654(d) (allowing a response to a protest).

63 3 AAC 48.654(e).

64 3 AAC 48.654(e); *see also* 3 AAC 48.130(f) (allowing formal investigations to be instituted by complaint only if the complainant shows "good cause" to "the commission's satisfaction"); *Jager v. State*, 537 P.2d 1100, 1106–08 (Alaska 1975) (explaining that the Public Utility Commission's decision to refuse to make an investigation under a complaint "involved factors within [the agency's] particular expertise and considerations of the value of a thorough investigation" and upholding the commission's good cause and public interest standard).

65 3 AAC 48.654(b); *see also* 3 AAC 48.110(b) (listing factors in intervention decisions, including statutory rights, "property, financial, or other interest[s]," the effects

Valdez would have borne some of the direct costs of developing the factual record it seeks—including discovery, presenting evidence, and examining witnesses.[66]

Valdez is incorrect that a protest "would have been a meaningless gesture because the core financial information necessary to properly form a protest was unconstitutionally and unlawfully withheld." [At. Br. 37] Valdez could have raised that exact concern—the lack of public information on Harvest's finances—as the "specific grounds" for its protest of the transaction.[67] And Valdez is wrong that a protest has "no form or meaning unless the RCA determines to investigate the concerns being raised and holds an evidentiary hearing." [At. Br. 37] This reasoning is backwards: in fact, filing a protest is precisely how a concerned observer can transform an otherwise uncontested, non-hearing application into a contested application that may involve an evidentiary hearing.[68]

If Valdez wanted the RCA to "designat[e] parties" and "hold[] an evidentiary hearing on contested issues of fact," [Exc. 375 ¶ 3] it needed to file a protest and petition to intervene, not sit on the sidelines and assert these desires in public comments. It cannot argue that the RCA deprived it of a "meaningful opportunity to engage in government

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of orders on those interests, other means to protect them, whether they will be protected by existing parties, whether participation will assist in the development of a "sound record," and the extent that intervention will "broaden the issue or delay the proceeding"); *Alaska Exchange Carriers Ass'n v. Regul. Comm'n of Alaska*, 292 P.3d 458, 464–65 (Alaska 2009) (reviewing the RCA's findings on the invention factors and holding denial of permissive intervention was not an abuse of discretion).

66 AS 42.06.610; 3 AAC 48.155(b).

67 3 AAC 48.654(b)(1); *see also* 3 AAC 48.130(b) (allowing parties to supplement protests with facts arising after the original filing).

68 3 AAC 48.654(e).

actions" or "[m]eaningful access" to the proceedings when it never sought to engage in or access those proceedings as a party through the available process.[69]

### 2. Requesting access to confidential records

Similarly, although Valdez's superior court appeal criticized the RCA's decisions to hold certain records confidential, Valdez never asked the agency to see them. [Exc. 371–72, 374–76] Valdez complained to the court that the RCA relied on a "secret record and thereby deprived "the citizens of Alaska and interested persons" the opportunity to engage in the RCA process, exercise free speech, have due process, and appeal to the courts. [Exc. 375–76 ¶¶ 1–4] But despite these asserted harms, Valdez never sought the records from the RCA in the agency process. In fact, Valdez waited until it filed an appeal to the superior court and *then* asked the court to require the RCA to disclose the confidential documents as part of the appellate record. [R. 4827–47; *see also* Exc. 322 (denying Valdez's Motion for Submission of Complete Record on Appeal)]

The RCA has an administrative process for requesting access to confidential documents that Valdez could have exhausted, but did not. Under 3 AAC 48.049(b) a "person may file a written motion requesting access to a record that the commission has designated as confidential." The regulation sets out a specific process for access requests, including service on the person with the confidentiality interest, an opportunity for that

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[69] The superior court also noted that filing a competing application under 3 AAC 48.645(c) was another available administrative remedy. [Exc. 318] Although Valdez may not have had a reason to file its own competing transfer application, the additional remedy highlights that hearings are intended to investigate and adjudicate contested issues, not simply to gather facts from applicants.

person to respond, an RCA decision, an opportunity for reconsideration or removal of the record from the RCA file, and ultimately a determination that the record "be made public" or that it be released under the terms of a protective order.[70]

Valdez argues that requesting access under that regulation would not have provided an adequate remedy because it wanted the documents for "the general public," not just for itself. [At. Br. 44] But if Valdez had requested access for itself, the RCA would have had express regulatory authority to decide that the documents should "be made public."[71] And even access just for Valdez under a protective order would have satisfied Valdez's own desire to evaluate Harvest's financial fitness—in its comments, Valdez complained that because "Hilcorp's financial information has been withheld from the public" there was no way for Valdez to "ensure Hilcorp's financial and operational capabilities." [Exc. 25–26] Such access also would have satisfied Valdez's alleged barrier to filing a protest. [*See* At. Br. 37] It would have addressed Valdez's argument that it could not adequately appeal. [Exc. 76 ¶ 4; R. 4827–47] And it would have addressed any alleged harm to Valdez from the confidentiality rulings. [*See* Exc. 375–76 ¶¶ 1–4]

Valdez was not excused from requesting access merely because the RCA held some of the records confidential under AS 42.06.445(c)'s protection for federally regulated pipelines. [Exc. 119–27] It is true that in Order No. 6, the RCA noted that if this statute applies, it has "no discretion to release the documents to the public . . . [and]

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70 3 AAC 48.049(b)–(f).

71 *Id.*

must treat the documents as confidential." [Exc. 124] But that merely means that such documents must be treated as confidential, not that the RCA cannot allow appropriate access to confidential records.[72] [*See* At. Br. 43–44] Moreover, the most compelling reason to grant a person access to otherwise confidential records is that person's participation as a party in the docket—something Valdez did not pursue.[73]

Valdez thus could have, but did not, request access to the documents at the agency level. Excusing this failure would deny Harvest and BPPA their procedural rights under the access regulation, deprive the RCA of its discretion to rule on access requests, and require the courts to make an initial decision that has been delegated to the RCA.

### 3. Opposing confidentiality positions

Not only did Valdez fail to request access to documents under the proper process for doing so, but the comments it did make about confidentiality were incomplete. Aside from commenting on the confidentiality statute's application to the first set of financial records, Valdez failed to object to any of the other confidentiality petitions. [Exc. 100–10] It could have done so: as the RCA explained in Order No. 6, "in non-hearing matters, any interested person may file documents authorized under 3 AAC 48.010 – 3 AAC 48.170 without first obtaining permission." [Exc. 123 (citing 3 AAC 48.110(a))] This includes filing a "statement of opposition" to any confidentiality petitions under

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72 3 AAC 48.049.

73 *See City of Fairbanks v. Alaska Pub. Utils. Comm'n*, 611 P.2d 493, 497 (Alaska 1980) (noting that due process may be satisfied by allowing a party to view and challenge records under an order of confidentiality).

3 AAC 48.045(c). Indeed, the RCA accepted Valdez's comments on the first set of financial records—even though they were filed after the comment window—because they could be treated as an opposition to a confidentiality petition. [Exc. 123]

Although it could have, Valdez filed no opposition to any of the later confidentiality petitions, meaning it did not object to the RCA treating as confidential:

- amendments to the purchase and sale agreements;
- operational risk assessments;
- minutes of owners' meetings;
- lists of repairs, replacements, and improvements;
- plans for improvements and modifications;
- insurance policies;
- operating agreements;
- narratives submitted in response to RCA questions;
- studies related to the expense of dismantlement, removal, and restoration;
- financial assurance agreements; and
- security documents and financial statements accompanying rights-of-way applications.

[*See* Exc. 174–75, 195–99, 200–01, 628–29, 692–94, 697] Valdez cannot now appeal all the RCA's confidentiality rulings when it objected to only one.

Opposing the confidentiality petitions would not have been futile, as Valdez now claims. [*See* At. Br. 39–43] The failure to exhaust administrative remedies may be excused "where the pursuit of the administrative remedy would be futile due to the certainty of an adverse decision."[74] But this rule requires the adverse decision to be *certain*—this Court has refused to excuse exhaustion where an adverse decision is merely *likely*. In *Standard Alaska Production Company v. State, Department of Revenue*, an

[74] *RBG Bush Planes, LLC v. Kirk*, 340 P.3d 1056, 1064 (Alaska 2015) (quoting *Bruns v. Municipality of Anchorage*, 32 P.3d 362, 371 (Alaska 2001)).

agency had received an attorney general's opinion that suggested a plaintiff's claim was untenable.[75] But still, an adverse decision did "not appear to be a 'certainty,' " and the agency remained "willing to seriously consider" legal arguments.[76]

Similarly here, an adverse decision was not certain. In opposing the confidentiality petition addressed in Order No. 6, Valdez argued that AS 42.06.445(c) could not protect the financial statements because they had not been labeled as confidential, that the applicants were not pipeline carriers, and that public policy warranted a narrowed construction of the statute. [Exc. 103–09, 121–22] The RCA was unpersuaded as to those documents. [Exc. 121–27] But that did not make it *certain* that after hearing arguments from both Valdez and the applicants the RCA would have rejected any opposition to subsequent confidentiality petitions for different documents.

Moreover, Valdez did not argue, as it does on appeal, that applying the confidentiality statute would deprive Valdez of "foundational constitutional and statutory rights to have meaningful access," "rights of free speech," "due process rights," "an opportunity to properly appeal," and "several" unnamed "constitutional and statutory provisions and protections." [Exc. 374–76 ¶¶ 1–4, 6] Since Valdez raised none of those points to the RCA, it is not at all certain that the agency would have rejected them.[77]

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75 773 P.2d 201, 209 (Alaska 1989).

76 *Id.*

77 *See RBG Bush Planes, LLC*, 340 P.3d at 1065 (rejecting futility argument where the agency "never refused to address" the party's contentions).

Finally, even if Valdez had raised its arguments before the RCA and persuaded the agency not to apply AS 42.06.445(c), there would still have been additional process that needed to be made available to Harvest and BPPA and that could have changed the outcome. Harvest and BPPA could have sought confidential treatment under the public interest balancing test.[78] Then, the RCA would have had an opportunity to determine whether there still existed good cause to classify the records as confidential.[79] And if it had held that the records should be released, Harvest and BPPA would have had an opportunity to request reconsideration or to withdraw the records entirely.[80]

In the end, allowing Valdez to appeal without having pursued remedies at the RCA would deprive the agency of the opportunity to first perform those "functions within its special competence," including making a record on disputed issues after hearing from both Valdez and the applicants, exercising its discretion to say when good cause exists to hold hearings, designate parties, or release records, and allowing it to correct potential errors *before* it issued a final order that allowed the underlying transaction to close.[81] Because Valdez pursued none of the available avenues of redress at the agency level, the superior court properly exercised its discretion in holding that Valdez failed to exhaust its administrative remedies. [Exc. 317–19]

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78 AS 42.06.445(b); 3 AAC 48.045(b).

79 3 AAC 48.045(b).

80 3 AAC 48.047(b).

81 *Doubleday*, 238 P.3d at 107 (quoting *Ben Lomond, Inc.*, 761 P.2d at 121–22).

## III. Valdez's claims are moot.

The agency decision-making process below served one purpose: deciding whether to approve the transfer of regulatory approvals related to BPPA's pipeline assets. That transfer decision has been made, the underlying transaction closed, and Valdez "is not seeking to 'undo' the transaction." [At. Br. 22] This moots Valdez's appeal because it is impossible for Valdez to rewind the clock and submit new comments or participate more fully in a proceeding on a transaction that closed in 2020.

Valdez's attempts to side-step this mootness fail. Valdez cannot now submit comments after the RCA has ruled on the transfer application, nor can it "add conditions to the transaction" when the transaction is closed. [At. Br. 22] After skipping the process that was available to it during the RCA's proceedings, Valdez cannot resuscitate this moot appeal by now asking the Court to create a "proxy" for an unavailable remedy. [At. Br. 54] And Valdez waived arguments about mootness exceptions by failing to raise them below.

### A. This case no longer presents a live controversy, and no appropriate remedy is available.

To avoid issuing advisory opinions, courts usually do not decide moot claims.[82] A claim is moot if it does not present a live controversy "and the party bringing the action would not be entitled to relief, even it if prevails."[83] Valdez acknowledges that the

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82 *In re Mark V.*, 324 P.3d 840, 848 (Alaska 2014).

83 *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1167 (Alaska 2002).

"Dismissal Order dooms Valdez's timely Order 17 appeal to have been mooted as of [the transaction] closing." [At. Br. 60] The RCA agrees. This case is moot because no meaningful remedy is available.

Valdez appeals orders that were part of a process that is now definitively and irreversibly complete. Valdez wanted Harvest's financial statements to inform its comments on the BPPA–Harvest transfer decision. [*See* Exc. 25–28] But the RCA made that decision more than a year ago, the transaction closed, and BPPA has left Alaska. [Exc. 227–28] Valdez does not seek to rewind the underlying transaction. [At. Br. 60] And if the transaction stands, the RCA cannot reasonably reconsider its certificate-transfer decision, because doing so would jeopardize pipeline operation.[84] Thus, even if the financial statements were made public, Valdez could not use them to inform comments about whether the RCA should approve the transfer. With the transfer definitively complete, any new comments would be abstract and untethered from any decision actually pending at the RCA.

Valdez could have avoided this mootness by requesting a stay of the agency decision, preventing the transaction from finalizing.[85] If it had done so and had ultimately won on the merits, the RCA could have altered its confidentiality rulings *before* its final decision.[86] Valdez and other members of the public could have then asked to submit

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84 AS 42.06.240 (requiring certificate to operate pipeline).

85 AS 44.62.570(f); *see* Alaska R. Civ. P. 62.

86 Final agency decisions are presumptively valid and enforceable. *See* AS 44.62.570(f) (requiring stay to block enforcement of appealed agency decision). The burden thus is on the appellant to seek a stay. *See id.*

revised comments. But Valdez instead stood by and let the RCA's final decision irreversibly take effect, vaporizing the only meaningful remedy—an opportunity to provide revised comments before the transaction closed.

When complex infrastructure transactions requiring agency approval are completed, intermediate agency decisions preceding the agency's approval become moot. In *Alaska Spine Institute Surgery Center, LLC v. State, DHSS* a joint health venture sought and received a certificate of need to build a healthcare building.[87] During the process, a competitor's hearing request was denied and appealed.[88] But the competitor did not seek a stay, so the building was completed.[89] This Court held that *even if* the competitor was entitled to a hearing, no remedy was available and the case was moot because the building was complete and could not be unbuilt.[90] A party that wants to challenge an intermediate agency decision must seek to stay the final agency decision.[91] This appeal is moot, just like the one in *Alaska Spine Institute*.

Valdez seeks to transform this appeal into a request for various other remedies that it asserts could still be meaningful. But as discussed above Valdez ignored opportunities to seek those very remedies from the RCA. Valdez argues that the Court should rule on the RCA's interpretation of AS 42.06.445(c), carve out "portions" of the RCA's orders,

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87 266 P.3d 1043, 1044 (Alaska 2011).

88 *Id.* at 1043–44.

89 *Id.*

90 *Id.*

91 *See id.*

and then have the RCA reconsider confidentiality questions, redo public participation, and release documents. [At. Br. 53] It argues this would "be a proxy" and allow the public "to advocate for conditions to be imposed upon Harvest Alaska" through its certificate. [At. Br. 54] But the applicants, like anyone requesting a final agency decision, had the right to rely on the RCA's certificate-transfer approval in the course of negotiating and closing their underlying transaction based on the specific terms of the current certificate. It would be fundamentally unfair to impose—for the first time—Valdez's novel "proxy" remedy. [At. Br. 54]

Valdez's "proxy" remedy would also upend the RCA's confidentiality framework. The framework, which allows people to contest initial confidentiality petitions in one way and to request confidential documents in another, serves a crucial purpose: it insulates the final certificate-transfer decision from squabbles over confidentiality.[92] Valdez's current appeal, in challenging aspects of the RCA's final order on the transfer decision, creates uncertainty for half a dozen energy companies and the Trans Alaska Pipeline System. But none of that uncertainty would exist if Valdez had timely challenged confidentiality petitions or sought to access confidential documents under 3 AAC 48.049 during the RCA's proceedings. Indeed, depending on which records Valdez sought and the outcome of that process, some of the appellees might not even be involved. And letting one party view a confidential document carries different risks for the parties seeking confidentiality than making a document public. The entities and the

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92 3 AAC 48.045; 3 AAC 48.049.

RCA would have been able to evaluate those considerations during the pendency of the transfer application review. This Court should not allow Valdez to use its failure to exhaust the RCA's regulatory procedures as a means to revive a moot appeal.

Simply put, this appeal is moot because Valdez cannot go back in time and submit more comments to the RCA on the transfer decision. And the Court should reject its novel "proxy" remedy theory, which would deny the RCA an opportunity to apply its expertise.

### B. Valdez waived arguments about mootness exceptions by not timely raising them below, and they do not apply in any event.

Valdez spends eight pages insisting that mootness exceptions apply, but never explains why the superior court rejected those arguments. [At. Br. 57–64] The reason: Valdez did not raise mootness exceptions until it moved for reconsideration, even though the superior court expressly asked Valdez to brief mootness. [Exc. 287] "It is well established that" this Court does not consider arguments that were raised for the first time in a motion for reconsideration.[93] The Court should not begin doing so today. But if it breaks with that practice, no mootness exceptions apply.

#### 1. The public interest exception does not apply.

This Court sometimes resolves moot cases of "grave public concern" under the public interest exception to mootness.[94] For example, the Court applies this exception to

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93 *Hannah B. v. State, Dept. of Health & Soc. Servs., Off. of Child.'s Servs.*, 289 P.3d 924, 935 (Alaska 2012).

94 *Doe v. State*, 487 P.2d 47, 53 (Alaska 1971).

appeals of involuntary mental health commitment orders because such orders involve a "massive curtailment of liberty" and "fundamental constitutional guarantees."[95] The public interest exception may apply if a moot case: (1) involves issues "capable of repetition" that (2) could evade review and (3) "are so important to the public interest as to justify overriding the mootness doctrine."[96] Even when these conditions are met, the Court may still decline to apply the exception.[97]

This case does not satisfy the first or second prongs of the public interest exception. First, it is unlikely that the factual circumstances of this case will repeat.[98] RCA determinations in transfer application cases are fact intensive. In any such case, a pipeline carrier can request waivers of filing requirements and petition for confidential treatment of submittals,[99] and the details of those applications and petitions will vary with applicants' organizational structures and roles in energy markets. This moot case thus involves the type of fact-intensive decisions that have caused the Court to avoid applying the public interest exception in past cases.[100]

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95 *In re Naomi B.*, 435 P.3d 918, 929 (Alaska 2019) (first quoting *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 375 (Alaska 2007); then quoting *Bigley v. Alaska Psychiatric Inst.*, 208 P.3d 168 (Alaska 2009)).

96 *Id.* 927–28 (quoting *Wetherhorn*, 156 P.3d at 380–81).

97 *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165 (Alaska 2002) ("We use our discretion to determine whether the public interest dictates . . . immediate review. . . .").

98 *See Alaska Spine Inst. Surgery Ctr., LLC v. State, Dept. of Health and Soc. Servs.*, 266 P.3d 1043, 1045 (Alaska 2011).

99 3 AAC 48.648(c), (d).

100 *See Alaska Spine Inst. Surgery Ctr., LLC*, 266 P.3d at 1045.

Second, future applications of confidentiality statute AS 42.06.445(c) are unlikely evade review. As Valdez notes, the RCA has "historically and repeatedly" applied the statute "[o]ver the past 21 years." [At. Br. 59] Valdez has not explained why future applications will evade review. RCA decisions on transfer applications do not necessarily lead to quick transactions that cause moot appeals. And in any event, an interested party can seek to stay future transfer decisions that may become moot. Thus, even if this case implicates a matter of public concern, the issues raised are unlikely to evade review.

**2. The collateral consequences exception does not apply.**

Another narrow mootness exception applies when a moot decision continues to cause harm through ongoing collateral consequences. For example, even after a mental health commitment order expires and thus becomes moot, it can continue to harm the respondent through "social stigma, adverse employment restrictions, application in future legal proceedings, and restrictions on the right to possess firearms."[101] Such collateral consequences can justify overriding the mootness doctrine, because overturning the moot decision could still provide a remedy in removing those consequences. In addition to mental health commitment orders, the Court has also applied the collateral consequences exception to a juvenile delinquency order[102] and a driver's license revocation.[103]

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101 *In re Joan K.*, 273 P.3d 594, 597 (Alaska 2021) (footnotes omitted).

102 *E.J. v. State*, 471 P.2d 367, 369–70 (Alaska 1970) (noting that negative juvenile records could influence future "school authorities, social workers, parole officers, judges . . . , the military services, or prospective employers").

103 *Graham v. State*, 633 P.2d 211, 213 (Alaska 1981).

Here, the decision below carries no collateral consequences for Valdez that can only be addressed by overturning the moot orders. Valdez argues that the collateral consequence it suffers is that "the RCA's Order 6 interpretation and application of AS 42.06.445(c) will continue to apply" to future RCA filings. [At. Br. 64] But Valdez and others will have the opportunity to challenge the RCA's interpretation and application of AS 42.06.445(c) to future filings in the context of those future filings. What the RCA will do in future cases remains to be seen, and is not a collateral consequence of any decision in this case that can only be addressed by adjudicating this moot appeal. The collateral consequences doctrine thus does not apply. And the Court should not sink additional time into this moot appeal.

## CONCLUSION

For these reasons, the Court should affirm the superior court's dismissal of Valdez's consolidated appeals.