

STATE OF ALASKA

THE REGULATORY COMMISSION OF ALASKA

Before Commissioners:

Robert A. Doyle, Chairman
John M. Espindola
Keith Kurber II
Robert M. Pickett

In the Matter of the Investigation Into the Beluga River Unit Management Practices of the MUNICIPALITY OF ANCHORAGE d/b/a MUNICIPAL LIGHT & POWER DEPARTMENT

U-18-102

In the Matter of the Application Filed by Chugach Electric Association, Inc. to Acquire Most of the Assets of the MUNICIPALITY OF ANCHORAGE d/b/a MUNICIPAL LIGHT & POWER DEPARTMENT, to Amend Its Certificate of Public Convenience and Necessity No. 8 to Add the Retail Electric Service Area Currently Served by the MUNICIPALITY OF ANCHORAGE d/b/a MUNICIPAL LIGHT & POWER DEPARTMENT Under Certificate of Public Convenience and Necessity No. 121, and for Related Regulatory Approvals

U-19-020

In the Matter of the Application Filed by the MUNICIPALITY OF ANCHORAGE d/b/a MUNICIPAL LIGHT & POWER DEPARTMENT to Amend Certificate of Public Convenience and Necessity No. 121, to Eliminate Its Retail Electric Service and Add the Eklutna Hydroelectric Project to Its Service Area, and to Lift the Dividend Restriction

U-19-021

ANCHORAGE ASSEMBLY’S MOTION TO REOPEN DOCKETS AND MODIFY ORDER NO. 39 DATED MAY 28, 2020

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The Anchorage Assembly respectfully moves to reopen the docket in this matter and modify Order No. 39 dated May 28, 2020, conditionally granting the Municipality’s application to amend its certificate of public convenience and necessity for the Eklutna Hydroelectric Project (the “Project”).¹ The Order required the Municipality to surrender its vote on all Project management and operation decisions, including policy decisions implementing the 1991 Fish and Wildlife Agreement.² The Assembly requests that the Commission modify the Order to allow the Municipality to exercise its vote as a majority owner of the Project, specifically on the proposed final Fish and Wildlife Program—a multi-decades, multi-million-dollar fish and wildlife mitigation plan governing the future of the Eklutna Dam.

Currently, under the conditions of the Order, the Municipality does not have a vote on the proposed final Fish and Wildlife Program even though the Municipality will be responsible for funding a portion of the implementation costs. Unless the Commission modifies the Order and allows the Municipality to vote, the proposed final Fish and Wildlife Program is expected to be submitted to the governor by the

¹ Order U-18-102(44)/U-19-020(39)/U-19-021(39) (May 28, 2020).

² August 7, 1991 Agreement Among the Municipality, Chugach Electric Association, Matanuska Electric Association, Alaska Energy Authority, National Marine Fisheries Service, U.S. Fish and Wildlife Service, and the State of Alaska [attached as **Exhibit 1**].

end of this month, potentially binding the Municipality to an estimated \$57-million mitigation plan that has not been approved by the Assembly as required by law.³

INTRODUCTION

In 2018, the Municipality sold Municipal Light & Power (“ML&P”) to Chugach Electric Association, Inc. (“Chugach”). As part of that transaction, the Municipality retained its 53.33 percent ownership interest in the Project but agreed to sell its share of the power output to Chugach and the Matanuska Electric Association (“MEA”) (collectively with the Municipality, the “Project Owners”). The Project Owners agreed that Project management and operations decisions would continue to be made by the Eklutna Operating Committee (“EOC”)—a group of representatives from each of the Project Owners. From 1996 until the May 28, 2020 Order, EOC decisions had been made “by double majority (a vote of two of the three Eklutna [Owners] whose shares total at least 51% of the Eklutna Project shares).”⁴

In 2020, the Commission concluded that it could only approve the ML&P sale if the Municipality surrendered its vote on the EOC.⁵ The Order noted that after the

³ See AO No. 2023-131, As Amended, § 1 (Dec. 19, 2023) (to be codified at AMC 26.30.025(B)(2)) [attached as **Exhibit 2**] (“The Proposed Final Fish and Wildlife Program to protect, mitigate, and enhance fish and wildlife resources in the Eklutna River shall be submitted to the Assembly with a proposed resolution in support for action, prior to its submission to the Governor of Alaska.”).

⁴ Eklutna Transition Plan, Exhibit E at 2 [attached as **Exhibit 3**].

⁵ Order U-18-102(44)/U-19-020(39)/U-19-021(39) at 147.

ML&P sale the Municipality no longer had an employee with the qualifications and experience to manage an electric utility.⁶ The Commission explained,

Under these circumstances we cannot unconditionally find that [the Municipality] is managerially or technically fit to maintain majority ownership of the Eklutna Project. We can only find that [the Municipality] is managerially and technically fit to maintain an ownership interest in the Eklutna Project subject to the condition that before the effective date of either the Eklutna [Power Purchase Agreement] or the MEA [Power Purchase Agreement], ML&P surrenders its vote on the EOC under the Eklutna Project agreements so that Chugach and MEA can jointly manage and operate the Eklutna Project, including negotiating compliance with the Fish and Wildlife Agreement, without [the Municipality] having a vote on operation or management decisions.^[7]

On October 27, 2020, the Municipality complied with the Order by entering into an agreement with the Project Owners in which the Municipality surrendered its voting rights on the EOC “and under the Fish and Wildlife Agreement.”⁸

While the Order may have been useful at the time based on the expectation that the Municipality would soon hire qualified staff for the Anchorage Hydropower Utility, the present circumstances in which a final proposed Fish and Wildlife Program will be imminently transmitted to the governor for approval without any

⁶ *Id.* at 67.

⁷ *Id.*

⁸ Notice of ML&P’s Surrender of Eklutna Operating Committee Voting Rights (Oct. 30, 2020) [attached as **Exhibit 4**].

affirmative act by the Municipality, nor its consent, renders the Order substantially unjust and deeply contrary to the public interest. Importantly, Anchorage Municipal Code is clear that the Assembly must approve the final proposed Fish and Wildlife Program before it is submitted to the governor.⁹ Thus, it is in the public interest that the Order be modified to allow the Municipality to exercise its vote as the majority owner of the Project on policy matters regarding implementation of the 1991 Agreement, specifically the adoption of a multi-decade, multi-million dollar fish and wildlife mitigation plan, which Anchorage residents will be obligated to pay for.

FACTUAL BACKGROUND

The Eklutna Project consists of a 40-megawatt dam on the Eklutna River that was originally constructed by the federal government in 1950s. In the 1990s the federal government agreed to sell the Project to the Municipality, Chugach, and MEA. Thus, the Municipality acquired a 53.33 percent interest in the Project; Chugach and MEA acquired the remaining 30 percent and 16.67 percent, respectively.

Because there were concerns regarding the Project's affects on fish and wildlife, the Project Owners entered into a fish and wildlife agreement with the State of Alaska, Alaska Energy Authority, and federal agencies.¹⁰ The 1991 Agreement requires the Project Owners to carry out certain measures to "protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and

⁹ Exhibit 2 (AO No. 2023-131).

¹⁰ See Exhibit 1.

habitat)” in lieu of complying with certain federal hydroelectric licensing statutes.¹¹ Under the 1991 Agreement, the Project Owners must conduct studies, publish a draft fish and wildlife program containing measures “for the protection, mitigation of damages to, and enhancement of fish and wildlife,” and submit a proposed final Fish and Wildlife Program to the governor for approval. The Project Owners “shall implement the Fish and Wildlife Program established by the Governor,”¹² beginning no later than 2027 and to be completed no later than 2032.¹³

In October 2023, the Project Owners released a draft fish and wildlife program based on a two-year study program and alternatives analysis.¹⁴ The draft program, referred to as the “portal valve alternative,” proposed to leave the Eklutna Dam in place but add a new valve and release structure to provide limited continuous, year-round flows from Eklutna Lake to the Eklutna River.¹⁵ The draft program proposes to use existing water line infrastructure to transport the water from the lake one mile downstream from the dam to the release structure, leaving a portion of the Eklutna

¹¹ See Alaska Power Administration Asset Sale and Termination Act, Pub. L. No. 104-58 § 104 (Nov. 28, 1995).

¹² Exhibit 1 at 5.

¹³ *Id.*

¹⁴ The draft program was developed by Chugach and MEA. Although the Municipality’s seal and name appears on the cover page, the Municipality did not have a vote on any decisions made by Chugach and MEA.

¹⁵ See Eklutna Hydroelectric Project, Draft Fish and Wildlife Program (October 2023), available at https://eklutnahydro.com/wp-content/uploads/2023/10/2023-10-27-Eklutna-Draft-Fish-and-Wildlife-Program_with-Appendices.pdf.

River de-watered. The Project Owners anticipate that the draft program will cost approximately \$57 million—and will be funded by increases to electric ratepayers and municipal property taxes.¹⁶ Importantly, the draft program did not consider a full dam removal option that was proposed by the Native Village of Eklutna and supported by many organizations and community members.¹⁷

On February 2, 2024, the Assembly adopted Assembly Resolution No. 2024-40, outlining the Assembly’s concerns with the draft program’s process and the potential affects to Anchorage drinking water. According to the Resolution, the “Municipality does not intend to issue authorizations or provide funds or any other form of support of the Draft Fish and Wildlife Program or any alternative that doesn’t restore the full length of the Eklutna River or comply with policy of the Municipality, as recently enacted by AO 2023-131.”¹⁸

On April 3, the Project Owners stated that “an alternatives analysis is not required under the 1991 Agreement [and] the Project Owners were not required to

¹⁶ See Presentation, Eklutna Fish & Wildlife Program, Anchorage Assembly Work Session (Dec. 7, 2023) [attached as **Exhibit 5**].

¹⁷ See Letter from Aaron Leggett, President, Native Village of Eklutna to Samantha Owen, McMillen, Inc., Re: Eklutna Hydroelectric Project Draft Fish and Wildlife Program at 3 (Feb. 19, 2024) [attached as **Exhibit 6**] (describing that during public meetings in summer 2023 NVE staff “asked the Project Owners’ consultant about estimating the costs and modeling impacts, of removing the dam. The consultant flatly rejected undertaking any dam removal analysis.”).

¹⁸ AR No. 2024-40, As Amended, § 2 (Feb. 2, 2024) [attached as **Exhibit 7**].

bring a handful of alternative proposals to the public.”¹⁹ The Project Owners indicated that they intended to submit the proposed final Fish and Wildlife Program to the governor by the end of April without the Assembly’s approval as required by AMC 26.30.025B.2.²⁰

LEGAL STANDARD

The Assembly seeks to narrowly modify an order conditionally granting a certificate of public convenience and necessity. When considering whether to grant a certificate under the Public Utilities Regulatory Act, AS 42.05, the Commission determines whether the “applicant is fit, willing, and able to provide the utility services applied for, and that those services are required for the public convenience and necessity.”²¹ The Commission considers three factors in deciding whether an entity is fit, willing, and able to provide service: the entity’s managerial, technical, and financial fitness.²²

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¹⁹ Letter from Andrew Laughlin, Tony R. Zellers, and Kolby Hickel, to Michael Curry, Eklutna, Inc. at 6 (Apr. 3, 2024) [attached as **Exhibit 8**].

²⁰ *Id.* at 1.

²¹ Order U-18-102(44)/U-19-020(39)/U-19-021(39) at 60 (citing AS 42.05.241).

²² *Id.* at 49.

ARGUMENT

A. Authorizing the Municipality to Vote on Policy Decisions Implementing the 1991 Agreement Is Overwhelmingly in the Public Interest, and Assembly Approval of the Fish and Wildlife Program Is Required by Law.

Anchorage voters reasonably expect that their elected government will have a say in how public tax dollars are spent. However, if the proposed final Fish and Wildlife Program is submitted to the governor without the Municipality's vote as a majority owner of the Project, the Municipality may be required to fund and implement an Eklutna mitigation plan that the Municipality did not formally approve.

It is vital that the Municipality's vote on matters regarding the 1991 Agreement be reinstated. Since 2017, the Assembly has consistently called for efforts to restore the Eklutna River and ensure continuous water flow to the greatest extent possible.²³ However, regardless of the substantive outcome or content of the proposed final Fish and Wildlife Program, there is a legal process that must be followed. Under AO 2023-131, the Assembly codified a requirement for Assembly approval before the plan is submitted to the governor. "The Proposed Final Fish and Wildlife Program to protect, mitigate, and enhance fish and wildlife resources in the Eklutna River shall be submitted to the Assembly with a proposed resolution in support for action, prior to its submission to the Governor of Alaska."²⁴ That code provision ensures that there is

²³ AR No. 2017-324(S), § 1 (Oct. 24, 2017) [attached as **Exhibit 9**]

²⁴ Exhibit 2 at 3.

a public process and that Anchorage’s elected policy-making body, the Assembly, will have a role in approving the proposed final Fish and Wildlife Program before it is implemented.

Subsequently, in February 2024, the Assembly clarified municipal law regarding the authority to make policy decisions implementing the 1991 Agreement. “Pursuant to section 26.30.025, the assembly shall be responsible for all policy decisions related to the municipality’s performance under the 1991 Fish and Wildlife agreement regarding the Eklutna hydroelectric project.”²⁵ Municipal law is clear; the Assembly has the responsibility to make policy decisions regarding the 1991 Agreement, including deciding whether or not to approve the proposed Fish and Wildlife Program.

The recent code changes mean that the Commission’s specific concerns at the time of the ML&P sale in 2020 are no longer applicable. There is no risk that policy decisions regarding implementation of the 1991 Agreement, specifically the adoption of the proposed final Fish and Wildlife Program, will be made by a municipal employee who lacks the required qualifications and experience. Although the Municipality has attempted to fill the open position with Anchorage Hydropower but has not succeeded, the lack of qualified employees is now a moot point. All policy

²⁵ AO No. 2024-28, § 1 (Mar. 19, 2024) (to be codified at AMC 3.20.070) [attached as **Exhibit 10**].

decisions, including whether to approve the Fish and Wildlife Program, may only be made by the Assembly.

Thus, the Commission should modify Order No. 39 to allow the Municipality to exercise its vote as a majority owner of the Project on policy decisions regarding implementation of the 1991 Agreement, specifically whether to approve the proposed final Fish and Wildlife Program.²⁶

B. Modification of Order No. 39 Will Not Affect Any Day-to-Day Management and Operation Decisions Regarding the Project.

The Assembly’s request is narrow. The Municipality’s vote on the EOC should be reinstated but only for policy decisions under the 1991 Agreement. The Assembly does not propose to reinstate the Municipality’s vote on any technical aspects of the Project, utility operations, or day-to-day management decisions. Those decisions, as outlined in the Exhibit E to the Eklutna Transition Plan,²⁷ would continue to be made by Chugach and MEA “until such time as [Municipal Hydropower] has shown to [the

²⁶ The Assembly expressly reserves and does not waive the argument that the Commission lacked jurisdiction and authority to require the Municipality to surrender its voting rights under the 1991 Agreement, and that the Administration lacked authority to enter into the 2020 “Surrender of Eklutna Operating Committee (EOC) Voting Rights.”

²⁷ See Exhibit 3.

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Commission's] satisfaction that [Municipal Hydropower] has acquired the expertise required to fully participate as a voting member of the EOC.”²⁸

CONCLUSION

For the foregoing reasons, the Commission should reopen the docket in this matter and modify Order No. 39 dated May 28, 2020. The Commission should allow the Municipality to exercise its vote on the EOC as the majority owner of the Project, but only on policy matters regarding implementation of the 1991 Agreement, including whether or not to approve the proposed final Fish and Wildlife Program before it is submitted to the governor. Because Anchorage law requires Assembly approval of the proposed final Fish and Wildlife Program, and the Municipality will be contractually bound to fund and implement the plan, there is no just reason why the Municipality should not have a vote before the plan is submitted to the governor.

DATED: April 15, 2024.

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²⁸ Order U-18-102(44)/U-19-020(39)/U-19-021(39) at 66-67 (noting that the Municipality's representative must have “knowledge of the Railbelt generation and transmission system, or prudent utility practice which is the management standard specified for the [Municipal] EOC representative in” the Chugach and MEA power purchase agreements).

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THE REGULATORY COMMISSION OF ALASKA

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CERTIFICATE OF SERVICE

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I, Riza Smith, hereby certify that on April 15, 2024, a true and correct copy of the included Motion to Reopen Dockets and Modify Order No. 39, Affidavit of Andrew Erickson, and Exhibits 1-10 were sent electronically to the following parties:

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