
City of Bethel, Alaska

City Council Minutes

March 19, 2002

Special Meeting

Bethel, Alaska

CALL TO ORDER

A special meeting of the Bethel City Council was held on March 19, 2002, at 6:30 p.m. in the Council chambers, Bethel, Alaska.

Mayor Rodgers called the meeting to order at 6:35 p.m.

ROLL CALL

Comprising a quorum of the Council, the following were present:

Jerry Drake	Stanley "Tundy" Rodgers
Hugh Short, Jr.	Dario Notti

Also in attendance were the following:

Robert Herron, City Manager
Colleen Soberay, City Clerk
Louann Cutler, City Attorney

PEOPLE TO BE HEARD

There was no one to be heard.

NEW BUSINESS

Item A — Bethel Native Corporation (BNC)/Crowley Marine: Pipeline corridor, Dock-use agreement, and Tract 5-C

Manager Herron explained he and Council member Drake are on the negotiating team and explained where the negotiating team is to-date. Manager Herron continued that the reason for this special meeting is to go through the information in detail with attorney explanations. He also said the negotiating team, after the information is presented, would seek Council's advise, as a collective body, to give direction to move forward with the negotiations.

Louann Cutler, City Attorney, explained the information provided to Council: Report of status of significant issues in negotiations with BNC and Crowley for access to City land for pipeline and use of dock; Easement Agreement; Facilities Use Agreement; Correspondence with Crowley, BNC and attorney's; Letter from State of Alaska Re: BNC/Crowley project as it relates to the Dept. of Conservation.

Council member Drake pointed out that Crowley and BNC have accused the City of delaying this project. He explained this is not the case, as the State of Alaska has stopped the project because of the Dept. of Conservation's review of the Oil Discharge Prevention and Contingency Plan, in that Crowley and BNC are required to submit additional information to the State before the State will approve the project.

Ms. Cutler said she would like to make it perfectly clear that Council makes all final decisions. Ms. Cutler and Manager Herron then discussed the following information with Council. Ms. Cutler and Manager Herron explained each item in the "Report of status of significant issues in negotiations with BNC and Crowley for access to City land for pipeline and use of dock:"

Presentation to Bethel City Council, March 19, 2001

Issue	Affected Document	Description
Changes to After Acquired Title Agreement	AATA	Many iterations. Parties currently agreed on many issues. Significant open issue: when tank farm restriction terminates. City's position in current draft: 60 years. BNC's position: never, unless parties renegotiate after 60 years. Please note that if Council agrees to a 60 year tank farm restriction, no other tank farm can be built on City land acquired under the AATA for 60 years, even if BNC tank farm does not get built or later is closed, and even if Yukon closes its tank farm.
Documents re Pipeline Access and Dock Use		We proposed a lease and use agreement. They proposed two separate documents: an easement and a use agreement. City negotiators have agreed to this, although an easement is harder for City to enforce and to terminate.
Parties/Guaranty	Both	We wanted BNC, Crowley Marine and Crowley Maritime (Crowley Marine's parent) to be parties. They want BNC to be the only party to the easement, with ability to assign to Crowley or another in the future, and they want Crowley Marine to be the only party to the use agreement, with ability to assign to a future operator of the BNC tank farm. City negotiators have agreed to their approach, if Crowley Maritime guarantees the performance of obligations in both documents. Guaranty is critical to the City to assure financial ability to perform obligations in the agreements.
Crowley's representation/warranty that its financial statements are correct	E and UA	City's current draft does not include this, but assumes we get CM's guaranty.
Access to Subsurface	Easement	Originally, City proposed that project could not start until they obtained permission to access the subsurface from the subsurface owner. Current City draft lets them go forward even if subsurface access is not obtained, with full indemnification for any claims made against the City if they decide to go ahead without obtaining subsurface owner's permission to access the subsurface. Large concession; could result in lawsuit with subsurface owner, road could get closed or tied up, may result in

		no project ever, yet they have five years to resolve it.
Route of Pipeline	E	Original agreement: Underground only, mostly underneath the road (Tract 5D). Recently, C/BNC have requested an alternative route and the ability to do it above ground, even in the road. City negotiators have not agreed to this because (1) do not want to tie up the alternative route for the very long term of the easement and (2) safety/environmental reasons to put pipeline underground if in road. If C/BNC want an alternative route later on, they can buy it from the City and terminate the easement. Related issue: must build alternative road for access during construction.
Easement Compensation	E	Currently: \$100/year for 60 years; FMV thereafter, if term is extended. Open question as to whether or not first 60 years at \$100/year would be upheld by a Court if challenged. May be upheld if this project considered for a public purpose and/or because of changes agreed to by BNC in AATA modification.
Term of easement	E	Original positions: BNC -- forever; City -- 40 years (term of BNC-C deal). Went through numerous iterations thereafter. Current positions: BNC—60 plus additional (at FMV rent) if in commercial operation, compliance with law and they want to extend. City—60 years; parties can renegotiate all subsequent terms in 60 years, except that rent would be FMV.
Termination of easement	E	Original positions: BNC -- no termination. City wanted ability to terminate under various conditions. Numerous iterations. Current positions: BNC—(1) if they default on a "material" condition and there's no other remedy; (2) if there is a final unappealable order re violation of law or (3) if they are not in commercial operation for 3 years, then they get an opportunity to cure and if don't cure "promptly," E terminates. City – (1) if violate E or (2) if City determines in "good faith" that they have violated law, then notice, 60 day opportunity to cure, and termination if not cured in additional 30 days. Immediate termination if ordered out of subsurface, don't start operations within 5 years, or if not in commercial operation thereafter for 3 years.
Term of Use Agreement	UA	City originally proposed 40 (same term as BNC/C lease). C has now asked for 60 years; City negotiators agreed.
Termination of UA	UA	Current positions: C—termination if breach or default but not if taking steps to cure. City—opportunity to cure, but must cure in 90 days. Also, immediate termination if don't start operations within 5 years, if not in commercial operations thereafter for 3 years, or if C doesn't operate.

Assignment	E and UA	Original position: City – no assignment; BNC/C – assignment under certain conditions. Current position: parties are close, but City negotiators would like a little more flexibility to reject potential assignee, but no unreasonable rejection. Both E and UA assignable to a third party who is operating BNC's tank farm only, and only if City approves in advance after review of financial and operating history. Another concession City has agreed to is to release BNC while E is assigned to Crowley; assignment to Crowley has to happen within 60 days of entering into E.
Environmental Protection	E and UA	Parties closer. Still unresolved: (1) indemnity for spills caused by unforeseeable Acts of God; (2) insurance for all pollution not just sudden and accidental, and COLA; (3) City's cross indemnity for environmental problems in 5D not currently known about; (4) City negotiators want access to updates to clean up plans; (5) City negotiators want agreement to be interpreted with environment as highest priority.
Indemnity	E and UA	Several important open issues: (1) City negotiators not willing to provide cross indemnity for spills in 5D currently unknown; (2) with respect to all else, City will only provide cross indemnity for things that are solely the City's fault or structural problems at dock; (3) City wants indemnity from C/BNC for Acts of God; (4) C/BNC agreed in concept to indemnify us for problems (access and spills) in subsurface but have not yet agreed to our language.
Insurance	E and UA	Parties closer. City has compromised on amount of pollution insurance (from \$100 million to \$10 million). Several important open issues. City wants: (1) automatic adjustments in insurance coverage minimums; (2) insurance for all spills, not just sudden and accidental; (3) insurance to last for 3 years after termination; (4) \$2 million minimum for Protection/Indemnity.
Access to company records	E and UA	We want the ability to obtain information needed to enforce agreements.
Enforcement of certain obligations after agreements terminate	E and UA	We originally proposed that all obligations should survive. They agree that indemnification obligations should survive. We also want obligations regarding insurance, restoration, and removal of their facilities at the dock to survive.
Maintenance on dock	UA	They want Bethel to agree that it will maintain sufficient to keep fuel flowing; City agreed in current draft to maintain as required by Corps.
Dock damage outside of indemnity	UA	If dock is destroyed by something other than what they indemnify us for, they want us to spend whatever insurance we have to fix it. If we don't fix

		promptly, they want to repair and offset repair cost against thruput fee or we are required to provide alternative facilities. City agreed to use insurance if available and to provide alternative facilities if they are available, but if not enough insurance, City wants to be able to terminate, as with Yukon agreement.
Local Hire	UA and E	They have not agreed for Easement yet.
Delivery of fuel after 10/15 allowed if river still passable	UA	City negotiators have agreed to this.
Warranty re enter into agreement	E	City inclined not to agree that it is authorized and empowered because of issue with adequacy of consideration; not an issue for UA.
Temporary Suspension of pipeline	E	City wants. Crowley not yet agreed, but agreed to temporary suspension of dock. City wants for both pipeline and dock for safety and environmental reasons.

Discussion briefly ensued on each of the items above explained by the City Attorney and City Manager.

Council member Drake said in light of the letter from the State stalling the project, he doesn't think the City needs to rush into any decisions. He continued that BNC chose not to deal with the environmental issue the State is now questioning. Council member Drake reiterated that the City told BNC and Crowley that this would need to be dealt with from the beginning.

Council member Short said he agrees that the City has made huge concessions and the City would be taking a chance on many of the items discussed. He continued that a letter from Crowley, dated March 19, 2002, doesn't show concessions by BNC and Crowley. Discussion briefly ensued.

Manager Herron asked that Council direct the negotiators to go back to the table with BNC and Crowley. Mayor Rodgers said he agrees that the City wants a fuel tank farm, but BNC and Crowley must respond and deal with the State's letter in regard to environmental requirements.

Council member Drake said the State's letter effectively stops the project, but maybe BNC and Crowley can meet the State's requirements and the City should be prepared to move forward.

Jeannie Sleeper, BNC Attorney, highlighted BNC and Crowley's concerns with the agreements. Ms. Sleeper touched briefly on several concerns, but discussed their major concerns: 1. Continued access to the river/port, in that BNC wants to ensure continued operations and does not want to lose the easement for every minor issue that may arise; 2. Assignment, in that BNC wants the ability to assign the easement to Crowley or a subsequent owner of the tank farm, as well as a release of BNC for actions of the operator and easement holder; 3. Release of liability, in that BNC won't have control of tank farm and therefore desires release of liability.

Ms. Sleeper said she agrees with Ms. Cutler that the parties are close on a lot of issues. She also requested that Council direct the negotiating team to continue working on this project.

Mayor Rodgers said BNC and the City have worked close together and that it appears Crowley is stalling this project. Discussion ensued.

Manager Herron asked Marc Stemp, BNC President, to comment on the State's letter to Crowley. Mr. Stemp said this evening was the first time he had been made aware of the letter. Ms. Sleeper said the negotiating team should move forward on the easement and let the State deal with the environmental issues.

Council member Short read excerpts of Crowley's letter, dated March 19, 2002, addressed to the City of Bethel. Council member Short then said this letter is accusing the City of stalling this project, but the City has done everything to keep this project moving. He continued that he wants the public to know that it is not the City that is stalling the project, but rather Crowley has dropped the ball on the required State permits. Council member Notti said he would not put too much weight into Crowley's letter, that it is just business. Discussion briefly ensued.

Mayor Rodgers asked if Council concurred to direct the negotiation team to continue with negotiations. Council concurred and so directed.

Item B — DMV Closure

Mayor Rodgers asked the City Manager why the DMV has been closed. He continued that there should be someone who is trained to cover the DMV, as the agreement was to keep an additional person trained to cover when there was not a DMV clerk.

Manager Herron provided a brief history of the DMV, in that the City has operated the DMV for two years. He explained the City does not currently have a DMV clerk, but did advertise and received four applications. Manager Herron explained all four applicants failed the written test.

Manager Herron clarified that Mr. Steel, Evidence Custodian/DMV Supervisor, is trained to administer the road test, but is not cross-trained to administer written tests or issue licenses for the DMV. He continued that the City hopes to get new applicants. Manager Herron said in the meantime, he would assign someone to the DMV to open it for a few hours a week.

Manager Herron also explained to Council that he is in discussions to possibly transfer oversight of the DMV to the Finance Department. In doing this, Manager Herron said he would require that several officers be cross-trained to administer the road test to help as backup. Discussion briefly ensued. Manager Herron said he would keep Council up-to-date on the DMV.

ADJOURNMENT

MOVED BY:	Drake	To adjourn the meeting.
SECONDED BY:	Notti	

VOTE ON MOTION	Motion carried by unanimous voice vote.
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With no further business before the Council, the meeting adjourned at 9:00 p.m.

APPROVED THIS 9th DAY OF APRIL 2002.

ATTEST:

Stanley "Tundy" Rodgers, Mayor

Colleen Soberay, City Clerk