

[Ombudsman's Note: Appendix B—This document was scanned from the original and redacted to protect confidentiality of ombudsman complainants per AS 24.55.160(b). There are minor differences in formatting between this copy and the original document.]

State of Alaska Local Boundary Commission

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July 27, 2007

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Re: Deltana Borough Incorporation
Ombudsman Complaints J2007-0091, J2007-0198, and A2007-0391

This is the response of the Local Boundary Commission (“LBC” or “Commission”) to the Ombudsman’s letter of June 27, 2007 (“Letter of June 27”); *Investigative Report* of June 27, 2007 (“Report”); and letter of July 17, 2007 (“Letter of July 17”), all relating to the above-referenced matter. The Ombudsman states that the following three allegations were investigated:

Allegation 1: The Local Boundary Commission arbitrarily found that Whitestone and the Native Village of Healy Lake are communities satisfying the requirements of AS 29.05.031(a)(1) and 3 AAC 110.045.

Allegation 2: The Local Boundary Commission unfairly failed to provide accessible public notice as required by the formal policies of the State of Alaska and accepted standards of public notice to the populations affected by the proposed borough incorporation, resulting in the population’s inability to participate in the public comment and hearing process.

Allegation 3: The Local Boundary Commission unreasonably failed to engage in government-to-government consultation with the tribal government of the Native Village of Healy Lake, as required by the State of Alaska policy adopted in the 2001 Millennium Agreement.

Letter of June 27, pp. 1-2.

The Ombudsman states that “Based on evidence more fully explained in the attached investigative report, I propose to find these allegations **justified**” (Letter of June 27, p. 2). Further, the Ombudsman proposes the following recommendations:

Members: Kermit L. Ketchum, Chair; Georgianna Zimmerle, First Judicial District;
Robert Harcharek, Second Judicial District; Lynn Chrystal, Third Judicial District;
Lavell Wilson, Fourth Judicial District

Recommendation 1: The LBC should pend its acceptance of the Petition while further evidence and public comment is solicited and at least one additional public hearing is conducted on the limited issue of whether or not the proposed Deltana Borough meets the requirement of social, cultural, and economic interrelationship and integration as established by AS 29.05.031 and 3 AAC 110.045. After such information is gathered, the LBC should issue an amended Final Report with the findings and conclusions based upon the information received.¹

Recommendation 2: The LBC should adopt a written policy and procedure for provision of “plain English” notices in compliance with State of Alaska policies and the LBC’s own non-discrimination policy. Such policy and procedure should utilize accepted “plain English” standards to insure that notices are accessible to the greatest number of people.

Recommendation 3: The LBC should adopt a written policy and procedure for provision of notices in languages other than English whenever the population affected by the proposed agency action includes a language minority (not limited to the language minorities protected by the Voting Rights Act of 1965) constituting more than 5 percent of the citizens of voting age. Such policy and procedure should include the provision of translation services at all public proceedings.

Recommendation 4: The LBC should adopt a written policy and procedure for government-to-government consultation with federally recognized Alaska Native tribes, in conformance with the express policies of the State of Alaska and the Alaska Department of Commerce. Such policy and procedure should include specific procedures for the affording of notice to tribal governments and consultation of tribal governments by LBC staff and commissioners on issues affecting the tribe related to the agency action being considered.

Letter of June 27, p. 2.

¹ “Recommendation 1” set out in the letter is different from that in the report. The recommendation in the letter states in relevant part, “The LBC should pend its acceptance of the Petition while further *evidence and public comment is solicited and at least one additional public hearing is* conducted on the limited issue of whether or not the proposed Deltana Borough meets the requirement of social, cultural, and economic interrelationship and integration as established by AS 29.05.031 and 3 AAC 110.045” (emphasis added). The words “evidence and public comment is solicited and at least one additional public hearing is” appear in the letter but not in the preliminary report.

The Ombudsman's allegations and proposed recommendations were reviewed by the LBC and its legal counsel in executive session on July 24, 2007.² The LBC responds as follows to the allegations and proposed recommendations.

Three independent agencies – the Local Boundary Commission, the State Attorney General's Office, and the Alaska Department of Commerce, Community, and Economic Development (DCCED) – respectfully conclude that the LBC does not have jurisdiction or the legal authority to carry out the Ombudsman's proposed Recommendation 1.

The LBC's legal counsel from the State Attorney General's Office advised the LBC that the Commission does not presently have jurisdiction over the incorporation petition for the Deltana Borough. This opinion is contrary to the Ombudsman's claim that the LBC could ask the Division of Elections to postpone the election while it implemented the Ombudsman's recommendations.

The LBC's legal counsel emphasized that under AS 29.05100(a), once the LBC has approved a petition for incorporation of a borough (which means that all requests for reconsideration have been addressed or denied), then the LBC is mandated by law to immediately notify the director of elections of its acceptance of the petition. The director of elections is then mandated by law to "order an election" within 30 days after being notified by the LBC. The law further requires that the election "shall be held" not less than 30 or more than 90 days after the date of the election order. The LBC's legal counsel from the State Attorney General's Office stresses that nowhere in law does it allow the LBC to ask for the petition back or for the LBC to request that an election be delayed in order to reconsider "on its own" its final decision.

The LBC's legal counsel indicated that if a court orders that the election be stayed, that would be an order made to the Division of Elections, not the LBC. The stay would most likely be in place while the appeal of the LBC's decision accepting the petition goes forward through the normal process set out in the Appellate Rules 601, *et. seq.* Earlier today, Randy M. Olsen, Superior Court Judge in Fairbanks, denied a motion for preliminary injunction to stay the August 21, 2007, election for the incorporation of the Deltana Borough (4 FA-07-01738 CI).

Under State law,³ the LBC's decision to accept the Deltana Borough incorporation peti-

² The LBC met in executive session because AS 24.55.180 provides that but the Ombudsman's "preliminary opinion or recommendation is confidential and may not be disclosed to the public by the agency or person."

³ The provisions of 3 AAC 110.570(g) state: "Unless reconsideration is requested timely under 3 AAC 110.580 or the commission, on its own motion, orders reconsideration under 3 AAC 110.580, a decision by the commission is final on the day that the written statement of decision is mailed, postage prepaid to the petitioners and respondents." On May 10, 2007, the LBC denied two requests for reconsideration of

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tion became final on May 10, 2007. On May 11, 2007, the LBC carried out its duty under AS 29.05.110(a) to provide immediate notice to the Director of Elections of the LBC's acceptance of the petition.

The Director of Elections carried out her duties under AS 29.05.110(a) on May 24, 2007, by ordering an election on the Deltana Borough proposal on August 21, 2007. Thus, in accordance with the Alaska statutes and regulations, the election order was issued "within 30 days after notification" by the LBC of its acceptance of the petition, and the election was scheduled to occur "not less than 30 or more than 90 days after the date of the election order."

Given that the LBC's decision to accept the Deltana Borough incorporation proposal was final 78 days ago, the LBC would be violating its own regulations if it now attempted to "pend" its acceptance of the petition as proposed by the Ombudsman.

In addition to the limitations in 3 AAC 110.570(g) and AS 29.05.110 discussed above, 3 AAC 110.580(b) provides that the LBC's power to order reconsideration on its own motion expires 20 days after a written statement of decision is mailed to the petitioner and respondents. In this case, the Commission's power to order reconsideration *on its own motion* ended on May 3, 2007.⁴

DCCED provides technical and administrative support to the LBC under AS 44.33.-020(a)(4). DCCED and the LBC are independent of one another with respect to policy matters. DCCED staff serving the LBC independently expressed the same conclusions reached by the LBC and the Attorney General's Office.

According to the Letter of July 17, the Ombudsman holds a differing opinion regarding the LBC's and the Division of Election's authority to stay the Deltana borough election:

[M]y staff reviewed whether LBC has statutory authority to seek a delay in the election. LBC legal counsel has stated there is no provision in statute for such a step. My in-house counsel has found nothing in the regulations, Elections policy and procedures manual, or case law reserving the issue of taking an initiative from the ballot solely to Elections. We disagree with LBC counsel . . .

Given the LBC's own reading of 3 AAC 110.570(g), AS 29.05.110, and 3 AAC 110.580(b); the legal opinion of the Attorney General's Office; and the advice of DCCED, the LBC respectfully disagrees with the opinion expressed above by the Om-

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its April 12, 2007, decision to accept the Deltana Borough incorporation petition. The LBC denied five other requests for reconsideration of that decision on April 30, 2007. It is the finality of that decision that allows it to be appealable to the courts.

⁴ The decisional statement was mailed to the Petitioner on April 13, 2007.

budsman's in-house counsel. The LBC hereby concludes that it does not have the legal authority to implement the Ombudsman's Recommendation 1.

The Ombudsman continued its investigation of complaints relating to a matter that became the subject of a judicial proceeding. The LBC respectfully contends that 21 AAC 20.010(a)(1) bars the Ombudsman's continued investigation and issuance of a preliminary report once a court appeal was filed.

State law (21 AAC 20.200(b)(3)) prescribes that "The ombudsman will discontinue an investigation . . . if, during the course of the investigation . . . the complaint relates to a matter that becomes the subject of a judicial proceeding." The Ombudsman was notified in June 2007 that two appeals challenging the LBC's decision approving the Deltana Borough petition to incorporate were filed in Fairbanks Superior Court. It is the LBC's position, which is supported by the Attorney General's Office and DCCED, that the plain reading of this regulation says that a "judicial proceeding" bars further investigation by the Ombudsman.⁵

The two lawsuits against the LBC involve the same subject; i.e., the LBC's approval of the Deltana borough petition to incorporate. In the first paragraph of her Letter of June 27, the Ombudsman describes the complaints as follows: "All three [complainants] alleged that the LBC acceptance and recommendation of the Petition for Incorporation of the Deltana Borough, a Unified Home-Rule Borough (Petition) were in error." Since the judicial proceedings (filed June 7 and June 11, 2007) and the complaints filed with the Ombudsman relate to the same matter, 21 AAC 20.200(b)(3) requires that the Ombudsman discontinue its investigation.

Again, the LBC's and its legal counsel's reading of 21 AAC 20.200(b)(3) differs from the interpretation of it by the Ombudsman. According to footnote 3 of the Ombudsman's Letter of June 27, when the Attorney General's Office notified the Ombudsman's investigator on June 7 that the first appeal had been filed, the investigator dropped one of the allegations it was investigating pursuant to the bar in 21 AAC 20.010(a)(1). However, the investigator later determined that the suit filed on June 11 did not bar investigation of the other allegations according to a 15-year-old internal memorandum issued by then-Ombudsman Duncan Fowler, dated December 14, 1991. The Ombudsman has not provided this memorandum to the LBC for review. Moreover, the LBC believes that an internal memorandum of an agency cannot override a regulation, especially one that on its face is mandatory, not discretionary. (See n. 5.)

⁵ It appears to the LBC that the wording of this regulation is mandatory - "the ombudsman will discontinue an investigation" - since there is no discretionary qualifier attached to the plain meaning of the sentence. A regulation is law (see *State. A.L.I.V.E. Voluntary*, 606 P.2d 777 (Alaska 1980), where the Alaska Supreme Court stated that a regulation is law in every meaningful sense and annulling any one of them effects a change in the law).

The means by which the regulation could be waived is by amending it under the Alaska Administrative Procedure Act to make it discretionary; e.g., “the ombudsman may” or “the ombudsman will, in its discretion.” The LBC notes that the Ombudsman has had more than fifteen years to amend 21 AAC 20.200(b)(3) to reflect the purported provisions in the 1991 memorandum, but it has not done so. The Alaska Supreme Court has held, “In general, an administrative agency must comply with its own regulations.^[6]” *United States v. RCA Alaska Communications, Inc.*, 597 P.2d 489, 498 (Alaska 1979). The LBC does not understand how a fifteen-year-old unpublished internal memorandum can supersede regulations in the Alaska Administrative Code, namely 21 AAC 20.200(b)(3).⁷

The decision of the Ombudsman to pursue this matter in light of the fact above is of concern to the LBC. However, adding greatly to the Commission’s concern is the fact that the Report addressed *specific points on appeal and did so using the exact standard that will be used by the court* rather than “application of more stringent standards than the matter under litigation” as is supposedly provided for in the Ombudsman’s internal memorandum of December 14, 1991.

In that regard, the LBC notes that at least four of the points on appeal allege that “The Local Boundary Commission erred, and violated 3 AAC 110.045 . . .” (*See Notice of Appeal*, Margret A. Mullins, Appellant, vs. Local Boundary Commission, June 11, 2007.) The Ombudsman exhaustively addressed matters directly relating to whether the LBC complied with 3 AAC 110.045 (*see Report*, pp. 6 – 12).⁸ The Ombudsman concluded in that regard:

It is the Ombudsman’s belief that the LBC offered no factual basis for its initial findings that there were multiple communities in the proposed Deltana Borough satisfying AS 29.05.031 and 3 AAC 110.045. *No reasonable basis* was offered in the LBC’s Statement of Decision for the finding of a “specific and persuasive showing” that “the social, cultural, and economic characteristics and activities of the people” in the proposed borough are “interrelated and integrated as required by 3 AAC 110.045(a). There was no discussion in the Statement of Decision as to what facts and prem-

⁶ [Footnote 20 in original.] *Service v. Dulles*, 354 U.S. 363, 388-89, 77 S.Ct. 1152, 1165, 1 L.Ed.2d 1403, 1418 (1957), relying on *Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954) (“Accardi I”); *Nader v. Bork*, 366 F.Supp. 104, 108 (D.D.C.1973); 3 *Menzies, Stein, Gruff, Administrative Law* s 14.01, 14-9 through 14-11 (1977); See generally 1 F. Cooper, *State Administrative Law* 270-72 (1965).

⁷ The Definition of *regulation* in AS 44.62.649(a)(3) states in pertinent part: “regulation” includes . . . “policies,” . . . “interpretative bulletins,” “interpretations,” and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public.”

⁸ Regrettably, as noted in the next major section of this response, the Ombudsman grossly erred in its exhaustive analysis by wrongly attributing to the LBC actions taken by DCCED.

ises supported the LBC's decision, and there was no discussion of the important factors involved in the determination. Therefore, ombudsman proposes to find **justified** the allegation that the LBC arbitrarily found Whitestone and the Native Village of Healy Lake to be communities satisfying the requirements [*sic*] 3 AAC 110.045.

Report, pp. 11 - 12. (Emphasis of "3 AAC 110.045" and "No reasonable basis" added; emphasis of the word "**justified**" is by the Ombudsman.)

Again, not only did the Ombudsman specifically address points on appeal, it used the identical standard to do so that will be used by the court to judge the appeal, notwithstanding the assertion by the Ombudsman that it uses a different standard. The Ombudsman asserts that it uses the "preponderance of the evidence" standard "to evaluate all ombudsman complaints" (Report, p. 6).⁹ That standard is different from the "reasonable basis" standard applied by the courts to LBC decisions. However, as noted above, the Ombudsman stated:

No reasonable basis was offered in the LBC's Statement of Decision for the finding of a "specific and persuasive showing" that "the social, cultural, and economic characteristics and activities of the people" in the proposed borough are "interrelated and integrated as required by 3 AAC 110.045(a).

The Alaska Supreme Court has repeatedly stated that the appropriate standard for review of LBC decisions regarding boundary proposals is the "**reasonable basis**" standard. (*Mobil Oil Corp. v. Local Boundary Com'n*, 518 P.2d 92, 98-99 (Alaska 1974) (emphasis added). See also *Moore v. State*, 553 P.2d 8, n. 20 at 36 (Alaska 1976) and *Valleys Borough Support Committee v. Local Boundary Com'n*, 863 P.2d 232, 234 (Alaska 1993)).

The Commission is concerned that the Ombudsman has continued its investigation despite the provisions of 21 AAC 20.200(b)(3). It is disappointing that the Ombudsman does not seem to recognize that it addressed issues on appeal using standards identical to the courts, notwithstanding a claim of constraints to the contrary. It is most disap-

⁹ AS 24.55.090 provides that, "The ombudsman shall, by regulations adopted under AS 44.62 (Administrative Procedure Act), establish procedures for receiving and processing complaints, conducting investigations, reporting findings, and ensuring that confidential information obtained by the ombudsman in the course of an investigation will not be improperly disclosed." Further, if an agency is going to apply a standard that "affects the public or is used by the agency in dealing with the public," it must adopt a regulation imposing that standard (see *Drafting Manual for Administrative Regulations*, State of Alaska Department of Law, pp. 3 -4, September 2005). The LBC notes that eleven principal State agencies and four State boards and commissions have formally adopted regulations imposing the "preponderance of the evidence" standard. The Ombudsman is not among them. Neither do the Alaska Statutes governing the Ombudsman prescribe the "preponderance of the evidence" standard. Moreover, it is unclear to the LBC whether a "preponderance of the evidence" standard is more stringent than a "reasonable basis" standard.

pointing, however, that the Ombudsman attempts to substitute its judgment for that of the constitutionally created LBC, a body to which the courts have granted great discretion.

Although the Ombudsman recognized the distinct roles of the LBC and DCCED early in the Report, the Ombudsman subsequently neglected to distinguish between the two independent agencies and often confused actions taken by DCCED as those of the LBC.

The Ombudsman reasonably characterizes the nature of the LBC and DCCED on p. 2 of the Report. However, the Ombudsman, thereafter, fails to make critical distinctions between the two independent agencies and misrepresents the actions of the two agencies. Because of time constraints in responding to the Ombudsman's Report, only a limited number of examples of these serious flaws are noted here.

The Ombudsman mischaracterizes DCCED's Preliminary Report and Final Report as products of the LBC (e.g., "the *LBC* found in its Preliminary Report" (Report, p. 7, emphasis added); "These facts were in the record prior to the *LBC*'s issuance of the Preliminary Report" (Report, p. 10, emphasis added); "the *LBC* should issue an amended Final Report" (Report, p. 21, emphasis added). DCCED, not the LBC, issued the preliminary and final reports in this proceeding under its duty in 3 AAC 110.530. Under statute, it is the "department's" duty to review and investigate a petition and prepare a report for the LBC:

Sec. 29.05.070. Review. The department shall review an incorporation petition for content and signatures and shall return a deficient petition for correction and completion.

Sec. 29.05.080. Investigation. (a) If an incorporation petition contains the required information and signatures, the department shall investigate the proposal and shall hold at least one public informational meeting in the area proposed for incorporation. The department shall publish notice of the meeting.

(b) The department may combine incorporation petitions from the same general area.

(c) The department shall report its findings to the Local Boundary Commission with its recommendations regarding the incorporation.

The Ombudsman errs repeatedly by claiming that the LBC concluded that Healy Lake and Whitestone are communities (e.g., "the LBC found . . . that Whitestone and Healy Lake were 'open and accessible' communities that are socially, culturally and economically related to Delta Junction and the Deltana region," Report, p. 7). The LBC made no such finding, nor was it required to find that there were two "communities satisfying the requirements of AS 29.05.031(a)(1) and 3 AAC 110.045" in order to approve the Deltana Borough petition for incorporation.

Again, the *Preliminary Report to the Local Boundary Commission on the Deltana Borough Proposal* and the *Final Report to the Local Boundary Commission Regarding the Deltana Borough Proposal* were written by DCCED, and they represent that agency's analyses and recommendations to the LBC.

The LBC is free to adopt, modify, or reject DCCED's recommendations. Sometimes the LBC may have a different interpretation of particular regulations, statutes, or constitutional standards than DCCED. For example, DCCED's conclusion after studying the matter was that Whitestone and Healy Lake were not "closed" communities and that both were communities as defined by the regulations. This DCCED conclusion and the explanation supporting that DCCED conclusion are in the Preliminary and Final Reports to the LBC. Some of the Commissioners disagreed. Some Commissioners thought Whitestone and Healy Lake were "closed" communities. The Commissioners rely on their own interpretation of the statutes, regulations, and Alaska Constitution; their own personal knowledge of the area;¹⁰ their own opinions; and their personal analyses of the written and oral comments that are supplied by parties and members of the public.

The Commission looked at 3 AAC 110.045(b) differently than DCCED did, which is evident from comments by Commissioners at the hearing on March 17 and from the LBC Statement of Decision, p. 16 - 21. The provisions of 3 AAC 110.045(b) state, "Absent a specific and persuasive showing to the contrary, the commission will presume that a sufficient level of interrelationship cannot exist unless there are at least two communities in the proposed borough." In the Preliminary Report, DCCED found that there were more than two communities.

In its Decision, the LBC noted that one member of the Commission took the position that Healy Lake and Whitestone are closed communities but that the presumption for multiple communities was overcome. In other words, as the Commission has done in other instances, the LBC found the legal requirements of 3 AAC 110.045 were met because there was a sufficient level of interrelationship even if multiple communities were not found to be present. Specifically, the LBC stated as follows:

Commissioner Hicks expressed the view that the area within the proposed Deltana Borough lacks multiple bona fide communities as determined under 3 AAC 110.920.^[11] We can overcome the presumption in 3 AAC

¹⁰ Former Chair Darroll Hargraves lived and worked in the area of the proposed borough as the consulting Superintendent for the Delta-Greely REAA from the fall of 1990 to June 1991. During that time he visited Healy Lake and had consultations with community officials about a school at Healy Lake. The Ombudsman complains that the LBC did not tour Healy Lake. A tour is not required, and the Ombudsman should not presume that the Commissioners have no knowledge of a place or have never visited there, simply because they did not choose to officially tour Healy Lake on March 16, 2007.

¹¹ [Footnote 12 in original.] Commissioner Hicks expressed the conclusion that Whitestone and Healy Lake are both closed communities in the sense that there is not unimpeded public access to or the right to reside there. He indicated further that there is a lack of frequent personal interaction between residents of Whitestone and the immediately adjoining properties. Moreover, he characterized the White-

110.045(b) that a sufficient level of interrelationship cannot exist unless there are at least two communities in the proposed borough through a higher level of proof (“a specific and persuasive showing”) that the proposed Deltana Borough meets the Community of Interests Standard. In that regard, we find the residents of the proposed Deltana Borough have strong ties with respect to social, cultural, and economic characteristics and activities, enough to overcome the presumption in 3 AAC 110.045(b). There exists among residents of the proposed Deltana Borough a compatibility of urban and rural areas, including compatibility of economic lifestyles, and industrial, or commercial activities. There also exists throughout the proposed borough, transportation and communication patterns that reflect, on a scale suitable for borough government, a population that is interrelated and integrated with respect to social, cultural, and economic characteristics and activities. Slavic immigrants comprise a significant component of the population of the proposed Deltana Borough. Some Slavic immigrants might not speak English very well. To the extent that is the case, however, there clearly are accommodations of spoken language differences. For example, arrangements were made for translation of our hearing and decisional session. Accommodations for spoken language differences are also made by the Delta-Greely REAA and through social service organizations in the proposed Deltana Borough. Lastly, the geographic area of the proposed Deltana Borough, which comprises an estimated 5,892 square miles, is of a scale suitable for borough government.

LBC Decisional Statement, pp. 19 - 20.

The failure of the Ombudsman to accurately distinguish DCCED from the LBC and to attribute DCCED actions to the LBC is troubling. More importantly, as noted in the previous major section, the question of whether the LBC’s conclusions regarding the satisfaction of the requirements of 3 AAC 110.045 is, the Commission respectfully believes, a matter best left to the court, not the Ombudsman.

The LBC complied with the law regarding public notice in the Deltana Borough incorporation proceedings. The Ombudsman’s recommendation regarding “plain English” notices warrants further review by the LBC. The Ombudsman’s recommendation regarding translation of notices and proceedings creates significant concerns on the part of the LBC.

The Ombudsman proposes to find as justified the allegation that the LBC “unfairly failed to provide accessible public notice as required by the formal policies of the State of Alaska and accepted standards of public notice to the populations affected.” The Om-

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stone Community Association as a contrivance created for purposes of securing permits for developments of the local landfill.

budsman proposes further to address that perceived shortcoming through two recommendations. The first is that the LBC adopt a written policy and procedure for provision of "plain English notices." The second is to adopt a "written policy and procedure for provision of notices in languages other than English whenever the population affected by the proposed agency action includes a language minority (not limited to the language minorities protected by the Voting Rights Act of 1965) constituting more than 5 percent of the citizens of voting age." Those two recommendations are addressed below.

Plain-English Notices.

The LBC, of course, wishes to ensure that its notices convey the information required by law in a manner that is understood by those potentially affected. State law prescribes the form and content of public notices relating to LBC proceedings. For example, 3 AAC 110.450(b) provides as follows with respect to the content of a notice of filing of a petition:

- [DCCED] shall specify the text of the public notices required in (a)(1) - (a)(4) of this section, to ensure that the notices contain the following information:
- (1) the title of the notice of the filing of the petition;
 - (2) the name of the petitioner;
 - (3) a description of the proposed action;
 - (4) a statement of the size and general location of the territory proposed for change;
 - (5) a map of the territory proposed for change, or information where a map of the territory is available for public review;
 - (6) a reference to the constitutional, statutory, and regulatory standards applicable to the commission's decision;
 - (7) a reference to the statutes and regulations applicable to procedures for consideration of the petition;
 - (8) designation of where and when the petition is available for public review;
 - (9) a statement that responsive briefs and comments regarding the petition may be filed with the commission;
 - (10) a reference to the regulations applicable to the filing of responsive briefs,
 - (11) the deadline for receipt of responsive briefs and comments;
 - (12) the mailing address, facsimile number, and electronic mail address for the submission of responsive briefs and comments to the department;
 - (13) a telephone number for inquiries to the commission staff.

For purposes of this response, a brief experimentation was undertaken with the Notice of Filing in the Deltana Borough incorporation proceeding. As written, it has a "Flesch

Reading Ease” score of 15.5 and a “Flesch-Kincaid Grade Level” score of 16.3.¹² Dramatic changes in the readability scores occur if information currently required by law is deleted from the notice. For example, if each “reference to the constitutional, statutory, and regulatory standards applicable to the commission’s decision” currently required by 3 AAC 110.450(b)(6) is deleted, the “Flesch Reading Ease” score increases from 15.5 to 28.3 and the “Flesch-Kincaid Grade Level” score drops from 16.3 to 14.0.

Beyond this, the LBC has not had an opportunity to fully consider the Ombudsman’s analysis, conclusions, and proposed recommendation regarding the proposed “plain English” recommendation. However, the LBC stresses that it complied with all statutory and regulatory requirements for public notice in the Deltana proceeding. Notice was published of the filing of the petition and all public meetings in two newspapers; in the online public notice website for the State; on the LBC’s website; via public service announcements; and in the Delta News Web, a popular local community website. Further, notices were posted in numerous places in the community, such as City Hall, the public library, the grocery store, and even in the bars. The public was obviously informed since 115 people attended the informational meeting on December 4, 2006; and 251 people attended the public hearing on March 16, 2007. A Russian translator was at the public hearing on March 16 and 17.

Provision of notices and oral translations for languages other than English.

As noted above, the Ombudsman has proposed that whenever the population affected by a matter that comes before the LBC includes a language minority (not limited to the language minorities protected by the Voting Rights Act of 1965) constituting more than 5 percent of the citizens of voting age, the LBC should provide notices in those languages and should provide translation services at all public proceedings.

With only a very limited time to consider that recommendation, the LBC has identified two very significant concerns regarding the Ombudsman’s analysis, conclusions, and proposed recommendations. First, there are significant legal constraints¹³ in implement-

¹² The “Flesch Reading Ease” test rates text on a 100-point scale; the higher the score, the easier it is to understand the document. The “Flesch-Kincaid Grade Level” test rates text on a U.S. school grade level. For example, a score of 8.0 means that an eighth grader can understand the document.

¹³ Regarding the legal constraints, the LBC notes that State law (AS 44.12.300 - 44.12.390) establishes English as the “official language” and that those laws apply both to the legislative branch of State government (of which the Ombudsman is a part) and to the executive branch of State government (of which the LBC is a part) (see AS 44.12.330). AS 44.12.310 provides that “The English language is the official language of the State of Alaska.” Moreover, AS 44.12.320 states that, “The English language is the language to be used by *all public agencies in all government functions and actions*” and that “The English language shall be used in the preparation of all official public documents and records, including all documents officially compiled, published or recorded by the government.” Further, it is noteworthy that AS 44.12.350 provides that “All costs related to the preparation, translation, printing, or recording of documents, records, brochures, pamphlets, flyers, or other material in languages other than English shall be

ing such a policy that were not addressed in the Report by the Ombudsman. Second, the proposed recommendation would likely have a significant fiscal impact on the business of the LBC and would be very difficult to implement.

The Commission's "adoption" of the policy recommended by the Ombudsman would, of course, need to be by regulation adopted under the Administrative Procedure Act. That process requires analysis of the fiscal impact of that policy on the agency (State) and the public and must be addressed in a fiscal note that accompanies the proposed regulation change. It is difficult to conceive that the cost of the "policy" suggested by the Ombudsman would be *de minimis* to the State.

With regard to the second concern, the LBC is wary of the practicality of implementing such a recommendation and the cost of doing so. Neither the LBC nor DCCED is aware of any practical means of determining what percentage of citizens of voting age speaks particular minority languages. The Ombudsman's Report and other evidence provides clear indication of the difficulty in making such determinations. For example, on p. 17 of the Report, the Ombudsman declares "members of the affected population who speak Russian therefore make up at least 24 percent of the total population of the region."

The LBC has serious doubts regarding that conclusion. The Ombudsman's conclusion is based on a questionable interpretation of an unsupported anecdotal statement that was not accepted by the LBC or DCCED.

In contrast to the Ombudsman's claim that at least 24 percent of the residents of the proposed borough speak Russian, the LBC notes that within the five areas of the proposed Deltana Borough identified by the United States Census Bureau for statistical purposes,¹⁴ the 2000 federal Census counted 306 individuals who were at least five years old that, at home, spoke Indo-European languages¹⁵ other than Spanish and also spoke English "less than very well." That constituted nine percent of residents of those five areas who were at least five-years old. If one were to assume that all of those 306 individuals spoke Russian (as opposed to any of the other hundreds of Indo-

(. . . continued)

defined as a separate line item in the budget of every governmental agency, department, or office." No such funding has been "defined as a separate line item in the budget" for the LBC or DCCED.

The Commission also notes, however, that those statutes are currently the subject of appeal to the Alaska Supreme Court as to their constitutionality. (*Alaskans for a Common Language, Inc. vs. State of Alaska, Moses Kritz, et al.*, Case No. S10590)

¹⁴ Healy Lake CDP, City of Delta Junction, Fort Greely CDP, Big Delta CDP, and Deltana CDP.

¹⁵ The Indo-European languages comprise a family of several hundred related languages and dialects, including most of the major languages of Europe, as well as many spoken in the Indian subcontinent (South Asia), the Iranian plateau (Southwest Asia), and Central Asia. Indo-European (Indo refers to India) has the largest numbers of speakers of the recognized families of languages in the world today, with its languages spoken by approximately three billion native speakers.

European languages), the Ombudsman's projection that 24 percent of the residents of the proposed Deltana Borough speak Russian is 2.7 times greater than the figure supported by the U.S. Census Bureau data. This circumstance alone demonstrates the difficulty of implementing the proposed recommendation.

In addition to concerns over the practicality of determining when a particular language population threshold has been reached, the LBC is concerned that the Ombudsman's proposal would carry a significant fiscal impact.

Notwithstanding the circumstances above, DCCED and the LBC did make reasonable accommodations within the law for persons who speak and read Russian and not English. Specifically, on February 27, DCCED received a request that a Russian translator be present for the upcoming public hearing, and that the announcement be translated into Russian. These arrangements were made without cost to the LBC or DCCED. The City of Delta Junction paid Oleg Kiselev an hourly rate to translate at the public hearing and decisional session on March 16 and 17, 2007. The City of Delta Junction also paid Svetlana Potton (a native speaker and certified translator, owner of *Russian Translating*), to translate into Russian the shorter version of the Notice of Tour, Public Hearing, and Decisional Meeting Regarding Deltana Borough Incorporation Proposal drafted by DCCED. Note that at the bottom, it says "A Russian translator, Oleg Kiselev, will be at the Public Hearing on March 16 and 17." (The difference between the shorter version of the Notice that was to be translated into Russian and the longer version is negligible. For example, the shorter version left out instructions on how to subscribe to the LBC's notice list service that is in the longer version.)

This notice, in Russian and English, was posted on the City's website, at the Delta Community Library and at City Hall, where the other public review petition materials were being kept, and on the Delta News Web, a popular community website for local news. The City Clerk also posted it in numerous other places around town. LBC Staff sent copies to two organizations in the Deltana area on March 9, 2007, and asked them to post the notice in their offices to spread the word about the upcoming hearing – Catholic Social Services, Refugee Assistance & Immigration Services; and Alpha Omega, a social service organization. On March 9, 2007, LBC Staff also called Sharon Dalton, who made the request that a translator be present at the hearing. DCCED informed Mrs. Dalton that a translator would be present at the hearing on March 16 and 17 and that a notice of the hearing had been translated into Russian; she was also asked how many copies she wanted for posting and distribution.

In addition to the foregoing, the Commission points out that any of its regulations affecting voting rights and procedures are subject to review and approval by the U.S. Department of Justice (DOJ) under the Federal Voting Rights Act of 1965.¹⁶ Further,

¹⁶ 42 U.S.C. Section 1973; 28 C.F.R. Part 51.

boundary changes approved by the Commission; e.g., the Deltana incorporation, are subject to review and approval by the DOJ.¹⁷

The Ombudsman neglected to contact proponents of the proposed Deltana Borough. Furthermore, the Ombudsman seems to casually accept as “fact” statements that support views expressed by the complainants and other borough opponents even though evidence to the contrary exists in the record. These circumstances give the impression that any effort to seek balanced points of view, which is essential to a fair evaluation, was lacking in this case.

The Ombudsman's Report states:

During this investigation, [Assistant Ombudsman] Ms. Burkhart interviewed, questioned, and solicited information from:

- [Name redacted], (Complainant A);
- [Name redacted], (Complainant B);
- [Name redacted], (Complainant C);
- JoAnn Polston, First Chief of the Mendas Cha-Ag Tribe;
- Don Bailey, resident of Delta Junction;
- Stephen Fields, President of Delta Regional Economic Development Council and former member of Charter Commission;
- Kathy Atkinson, Local Government Specialist, LBC;
- Marjorie Vandor, Assistant Attorney General.

Report, pp. 3 - 4.

The Commission finds it remarkable that, with the exception of Ms. Atkinson and Ms. Vandor (who are both neutral State agency personnel), all the individuals that the Assistant Ombudsman interviewed, questioned, and solicited information from in this

¹⁷ It is worth noting that the federal Voting Rights Act includes minority-language-assistance provisions. Under those provisions, the covered jurisdictions are required to provide language assistance to groups covered by the Act. **The requirement to provide minority-language assistance applies to ballots (polling place, sample and absentee), voter-registration forms and instructions, candidate qualifying forms and instructions, polling-place notices, instructional forms, voter-information pamphlets, and oral assistance throughout the electoral process.** (28 C.F.R. 55.19.)

Language-minority groups covered by the federal Voting Rights Act are limited to American Indians, Asian Americans, Alaskan Natives, and Spanish-heritage citizens - the groups that Congress found to have faced barriers in the political process. Language-minority groups covered by the federal Voting Rights Act are determined by the U.S. Census Bureau after each census based upon a formula set out in the Voting Rights Act. The most recent determinations were made on July 26, 2002. For Alaska, the areas in which language minority groups were identified are listed in the Table enclosed with this letter.

matter are opponents to the formation of the Deltana Borough. It is particularly surprising that the Assistant Ombudsman failed to interview, question, or solicit information from Mike Schultz, the Petitioner's Representative and the Deltana Borough Charter Commission Chair. Neither did the Assistant Ombudsman interview, question, or solicit information from local public officials such as the Mayor of the City of Delta Junction or the Delta Junction City Administrator. Further, the Assistant Ombudsman did not interview, question, or solicit information from other local residents who supported formation of the Deltana Borough. This circumstance is troubling to the Commission because it gives the impression that any effort to ensure balanced points of view in this investigation was lacking.

Moreover, in several instances, the Ombudsman seems to accept statements that are contradicted by facts and evidence presented in DCCED's Preliminary and Final Reports or that are not supported by other evidence.

For example, the Ombudsman seems to accept JoAnn Polston's statement that Healy Lake is an all-Native Community. In actuality, Healy Lake is a mixed Athabascan and non-Native community. According to the 2000 census, 27 percent of the population of Healy Lake is White, and the remainder is Alaska Native and American Indian (DCCED Preliminary Report, p. 54; DCCED Final Report, p. 24).

Another example is found on p.10 of Report, which states that there is no school and only two students at Healy Lake. DCCED reported on p. 39 of its Final Report that there is a school (not presently operating) and there were four students in Healy Lake during the 2006-2007 school year.

One last example offered here of the Ombudsman's "evidence," which under closer scrutiny does not seem to be evidence at all, is the Ombudsman's statement on p. 18:

Viktor Linnik provided evidence with his Request for Reconsideration that a substantial portion of the citizens of Russian or Ukrainian descent (50 percent of those polled) did not speak, read or write English fluently. (See Request for Reconsideration of Viktor Linnik, p. 14-17.)

Viktor Linnik polled 106 "Russian and Ukraine USA non-citizens" and 70 "Russian and Ukraine USA citizens", asking (in English) "Can you speak, read and write an [sic] English fluently?" All the individuals polled, both citizens and non-citizens, even those checking the column that they were not fluent in English, either signed or printed their names in legible English. Thirty-two percent (34/106) of the Russian and Ukraine **noncitizens** responded that they were fluent in English, while 77 percent (82/106) indicated they were not fluent in English. Of the 70 **citizens** polled, 51 percent (36/70) responded that they were fluent in English, while 48.5 percent (34/70) indicated they did not speak, read and write English fluently. This latter statistic is rather remarkable, since to gain citizenship in the United States, a person has to reside in the United States five years, pass a civics test, and pass a test proving written and oral command of English.

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And it should go without saying that just because a person does not feel that they are completely fluent in oral and written English as a second language, it does not mean they are unable to participate in society, their local government, and community; understand current issues; fill out federal income tax forms; and be a vibrant and productive member of the community.

The above circumstances give the impression that any efforts to seek balanced points of view, which is critical to a fair evaluation, were lacking.

The Local Boundary Commission did not unreasonably fail to engage in government-to-government consultation with the tribal government of the Native Village of Healy Lake, as purportedly required by the State of Alaska policy adopted in the 2001 Millennium Agreement.

The Ombudsman is critical of the proceedings in terms of consultation with the Native Village of Healy Lake. As an example of perceived appropriate public policy in that regard, the Ombudsman cites the Alaska Department of Corrections "Policy and Procedure 107.01B," which prescribes that "The department will make a good faith effort to notify any federally-recognized tribe in Alaska, at the earliest practicable time, of any proposed departmental actions"

Perhaps the Ombudsman failed to realize that in carrying out its duties under 3 AAC 110.450(a)(4), DCCED directed the Petitioner's representative to provide notice of the filing of the Petition to the Healy Lake Village Council. Evidence that such was accomplished was provided to DCCED. Thus, the Healy Lake Village Council was properly notified of the filing of the Petition.

Moreover, during the course of the proceedings, DCCED communicated with JoAnn Polston, First Chief of the Mendas Cha-Ag tribe, several times by phone and e-mail in 2006 and 2007. DCCED asked her information about Healy Lake – specifically about the roads, airstrips, landing on the lake and airstrip in the winter, the winter ice-road into Healy Lake and when it was sufficiently frozen enough for travel. By e-mail, DCCED sent Ms. Polston a written account of her December 4 oral comments at the informational meeting in Delta Junction, before those comments were published in the Final Report, asking her for her edits or comments, but received no response. At no time did Ms. Polston complain that that this government-to-government contact was insufficient.

JoAnn Polston and the Tanana Chiefs Conference were also sent copies of the Preliminary and Final Reports. Ms. Polston attended both the DCCED informational meeting regarding the incorporation proposal and the LBC hearing on the matter.

Lastly, while the LBC promotes every reasonable means to encourage public awareness of and participation in its proceedings, the Millennium Agreement expressly provided that it created "no legally binding or enforceable rights." (See Section 31 of the Millennium Agreement.)

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Conclusion

The preceding constitutes the response of the LBC to the Ombudsman's Letter of June 27, her Report, and Letter of July 17. From the LBC's perspective, it would have been helpful if additional time had been allotted for review. If further information is desired or if there are questions concerning any aspect of this response, please let me know.

Cordially,

/s/

Kermit L. Ketchum
Chair

Enclosure: Covered Areas in Alaska for Voting Rights Bilingual Election Materials

cc: Bob Harcharek, LBC Vice-Chair and member from Second Judicial District
Georgianna Zimmerle, LBC member, First Judicial District
Lynn Chrystal, LBC member, Third Judicial District
Lavell Wilson, LBC member, Fourth Judicial District
Emil Notti, Commissioner, DCCED
Mike Black, Director, Division of Community Advocacy, DCCED
Marjorie Vandor, Assistant Attorney General

[Ombudsman's Note: This table appeared as a two-page appendix to the commission's letter. The original is unpaginated and has no header. The table broke to the second page after the first entry for the Wade Hampton Census Area.]

Covered Areas in Alaska for Voting Rights Bilingual Election Materials

Area	Language Minority Group
Aleutians West Census Area:	Aleut
Bethel Census Area	Eskimo
Bethel Census Area	American Indian (Tribe not specified)
Bethel Census Area	American Indian (Other Tribe specified)
Denali Borough	Athabascan
Dillingham Census Area	Eskimo
Dillingham Census Area	American Indian (Other Tribe specified)
Dillingham Census Area	Native (Other Group specified)
Kenai Peninsula Borough	American Indian (Tribe not specified)
Kenai Peninsula Borough	Aleut
Kodiak Island Borough	Filipino
Lake and Peninsula Borough	Athabascan
Lake and Peninsula Borough	Aleut
Lake and Peninsula Borough	Eskimo
Nome Census Area	Eskimo
North Slope Borough	American Indian (Tribe not specified)
North Slope Borough	Eskimo
Northwest Arctic Borough	Eskimo
Northwest Arctic Borough	Alaska Native (Other Group specified)
Southeast Fairbanks Census Area	Athabascan
Southeast Fairbanks Census Area	Native (Other Group specified)
Valdez-Cordova Census Area	Athabascan
Wade Hampton Census Area	Eskimo
Wade Hampton Census Area	American Indian (Chickasaw) ¹⁸
Wade Hampton Census Area	American Indian (Tribe not specified)
Yukon-Koyukuk Census Area	Athabascan
Yukon-Koyukuk Census Area	Eskimo
Yukon-Koyukuk Census Area	American Indian (Other Tribe specified)
Source: <i>Federal Register</i> , Vol. 67, No. 144, p.	48872, Friday, July 26, 2002, Notices

¹⁸ [Note 1 in original appendix] The *Federal Register* does indeed list Chickasaw as a minority language group in the Wade Hampton Census Area. We recognize the Chickasaw as a Native American people originally from present-day Mississippi, now mostly living in Oklahoma. They are related to the Choctaws, who speak a language very similar to the Chickasaw language, both forming the Western Group of the Muskogean languages.