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Paralleling the U.S. move toward greater competition in gas markets, Canada progressively liberalized its procedures for review of natural gas export applications. In 1984, Canada shifted away from regulated, uniform, volumetric prices for exports that had been instituted in 1975, to a policy that offered exporters the option of negotiating the sales price in export contracts. As of 1986, the Canadian National Energy Board (NEB) no longer required that it give prior approval of export prices. In 1987, the NEB adopted new procedures that allowed market forces to determine export levels as long as Canadian needs are served adequately and fairly.

Finally, the U.S./Canada Free Trade Agreement came into force January 1, 1989. It was a reflection of the changes that had taken place in both countries' energy policies. It formalized the principle that free and open trade is in the best interest of the citizens of the U.S. and Canada.

This evolution in natural gas trade has not been confined to Canadian imports. In 1983, President Ronald Reagan and Japanese Prime Minister Yasuhiro Nakasone indicated their interest in private commercial efforts to bring North Slope natural gas to Pacific Rim countries, including Japan. They recognized the benefits in the free trade of energy resources, as demonstrated by the gas export project operated jointly by Phillips 66 Natural Gas Company and Marathon Oil Company which, for about 20 years, has liquefied and shipped gas from the Cook Inlet area of southern Alaska to markets in Japan.¹⁶

In 1982, Yukon Pacific began exploring the concept of a trans-Alaska pipeline, combined with a liquefied natural gas (LNG) terminal in southern Alaska, for marketing North Slope gas in Japan and other Pacific Rim countries. In 1984, after studying the feasibility of the project, Yukon Pacific applied to the Bureau of Land Management (BLM) and the U.S. Army Corps of Engineers (USACE)

for the necessary permits to build the TAGS pipeline. A right-of-way grant for the TAGS project was issued by BLM on October 17, 1988.

On January 12, 1988, President Reagan removed the section 12 impediment to exports of North Slope natural gas by issuing a finding that such exports would not affect adversely the quantity, quality, or price of the energy supplies available to U.S. consumers.¹⁷ In particular, the President found that "there exist adequate, secure, reasonably priced supplies of natural gas to meet the domestic demand of American consumers for the foreseeable future." The President acted to let "the marketplace undertake a realistic consideration of various options concerning Alaska natural gas" by allowing "any private party to develop this resource" and setting "up competition for this purpose." The President's *Finding* stated that "the operation of market forces is the best guarantee that Alaska natural gas will be developed efficiently and that there will be an incentive to find additional reserves."

In conclusion, North Slope natural gas is a major energy resource whose efficient development has been a goal of U.S. energy policy since its discovery in 1968. In response to changing conditions in the domestic and international energy markets, there have been various proposals for developing this resource. Legislative and regulatory policy changes in the past decade and market forces have combined to increase competitiveness of natural gas in the U.S. market. As of yet, however, North Slope gas has been left undeveloped. It is in this historical context that the DOE considered Yukon Pacific's application to export North Slope gas.

III. Procedural History

A. Application and Project Description

On December 3, 1987, Yukon Pacific filed an application with the Economic Regulatory Administration (ERA),¹⁸ for authority under the Natural Gas Act (NGA) to export up to 14 million metric

¹⁶ Currently, approximately 52 trillion Btu's (52 Bcf) of LNG annually is authorized to be exported by Phillips 66 Natural Gas Company and Marathon Oil Company. See Phillips 66 Natural Gas Company; Marathon Oil Company, 1 ERA ¶ 70,130 (July 28, 1988).

¹⁷ See *Presidential Finding Concerning Alaska Natural Gas*, 53 FR 999 (January 15, 1988).

¹⁸ On January 6, 1989, certain functions, including the regulation of natural gas imports and exports, were transferred from the ERA to the Office of Fossil Energy.

tons of LNG annually (660 Bcf regasified) to the countries of Japan, South Korea, and Taiwan for 25 years, beginning on the date of first delivery. The natural gas would be transported from the North Slope by means of the proposed TAGS pipeline to a tidewater site at Port Valdez, Anderson Bay, on Alaska's southern coast. At Valdez, the gas would be converted to LNG for ocean transport to the Pacific Rim markets.

According to Yukon Pacific, construction of the proposed TAGS facilities will require five years and will commence when all required governmental approvals are obtained and LNG sales contracts are signed with the Pacific Rim customers. The first exports of LNG are expected to occur in 1996 when construction of TAGS is scheduled to be completed and Yukon Pacific would be able to initiate operations. The principal components of the TAGS project are: (1) a 796.5-mile, 36-inch outside diameter, buried and chilled natural gas pipeline from Prudhoe Bay to Port Valdez, with a design capacity of 2.3 Bcf of natural gas per day; (2) ten compressor stations along the pipeline; (3) a liquefaction plant at Port Valdez that would include four LNG processing units to remove impurities from incoming gas, and to reduce the temperature of the gas to -259 degrees Fahrenheit, condensing it to the liquid state for storage and shipping; (4) four LNG storage tanks, each with an individual capacity of 800,000 barrels (bbls); (5) a marine terminal to berth and load two LNG tankers; and (6) 15 LNG ocean transport vessels having individual cargo capacities of a nominal 125,000 cubic meters. In addition to the above facilities proposed by Yukon Pacific for the TAGS project, a gas conditioning plant would be required in the Prudhoe Bay area to deliver to the TAGS pipeline natural gas of a quality suitable for subsequent conversion to LNG at Anderson Bay.

Yukon Pacific states that it has entered into discussions with the owners (certain producers and the State of

Alaska) for their North Slope gas. These discussions are focusing primarily on purchasing gas from the principal reservoir in the Prudhoe Bay Field, the Sadlerochit formation. According to Yukon Pacific, the contract terms with each producer would be established through arms-length negotiations and would be flexible over the term of the agreements to reflect market conditions. The purchase price to be paid to producers would be determined by a formula using a base price per MMBtu adjusted for variations in the LNG price at the point of destination. With respect to the sale of this gas, Yukon Pacific expects to negotiate in arms-length transactions 25-year contracts that would be responsive to international gas market conditions. Yukon Pacific anticipates that the delivered price of LNG sold under the proposed export arrangement would start with a base price per MMBtu and would vary each month according to a formula based upon changes in the average selling price of selected major crude oils.

B. Notice and Interventions

The DOE issued a notice of the application on February 1, 1988, inviting protests, motions to intervene, notices of intervention, and comments to be filed by March 11, 1988.¹⁹ Seven timely motions to intervene were filed: by Northwest Pipeline Corporation (NPC), the State of Alaska, Pacific Gas Transmission Company (PGT) and Pacific Gas and Electric Company (PG&E) (jointly), Alaskan Northwest Natural Gas Transportation Company (Alaskan Northwest), Foothills Pipe Lines (Yukon) Ltd. (Foothills), the TAPS Carriers and Alyeska (jointly),²⁰ and the Exxon Corporation (Exxon). Statoil North America, Inc. (Statoil) filed a late motion to intervene on March 25, 1988. Air Products and Chemicals, Inc., filed comments supporting the TAGS project but did not seek to intervene. The U.S. Department of State (State Department) submitted a letter²¹ it received from the Canadian Embassy concerning the application. Alaskan Northwest and

¹⁹ 53 FR 3617, February 8, 1988.

²⁰ The TAPS Carriers are seven companies that own the Trans-Alaska Pipeline System. They are: Amerada Hess Pipeline Corporation, ARCO Pipe Line Company, Exxon Pipeline Company, Mobil Alaska Pipe Line Company, Phillips Alaska Pipeline Corporation, Sohio

Alaska Pipeline Company, and UNOCAL Pipeline Company.

²¹ Letter dated March 9, 1988, from Mr. Leonard H. Legault, Charge d'affaires, Canadian Embassy to Mr. John P. Ferriter, Deputy Assistant Secretary for International Energy and Resources Policy, Department of State.

Foothills opposed the application, requested its dismissal, and in the event that the application was not dismissed, Foothills requested a trial-type hearing and discovery procedures. (Hereafter in this order, where their views coincide, Alaskan Northwest and Foothills are referred to collectively as the ANGTS sponsors.) NPC did not express an opinion on the merits of the export proposal.

C. Order Requesting Additional Comments

On July 25, 1988, the DOE issued a procedural order requesting further information from Yukon Pacific, providing opportunity for further comment from all parties, and granting intervention to all eight movants who responded to the DOE's February 8, 1988, *Federal Register* notice of the application. The DOE denied several motions filed by the parties requesting: (1) dismissal of the application; (2) denial of interventions; (3) a trial-type hearing; (4) rehearing; and (5) an opportunity to conduct discovery. The requests for additional procedures were denied without prejudice to the filing of similar requests at a later stage in the proceeding.²² The procedural order requested submission of comments by August 24, 1988, reply comments by September 23, 1988, and requests for additional procedures by October 10, 1988. The DOE received comments from Alaskan Northwest, Foothills, Yukon Pacific, the State of Alaska, PGT and PG&E (jointly), and Statoil.

D. Alaska Public Conference

Following submission of comments in response to the DOE's July 25, 1988, procedural order, Foothills filed a request for a trial-type hearing, or alternatively, a public conference. In addition, Alaskan Northwest renewed its earlier request expressed in its motion to intervene for dismissal of Yukon Pacific's application.

On December 5, 1988, the DOE issued a procedural order that denied the requests for dismissal of the application and for a trial-type hearing but granted the request for a public conference.²³ The

order set January 25, 1989, as the date for the public conference to be held in Anchorage, Alaska. Alaskan Northwest, Foothills, the TAPS Carriers, Exxon, the State of Alaska, and Yukon Pacific filed written statements or made oral presentations at the public conference.

E. Other Filings

The State Department submitted on January 11, 1989, a letter to be added to the record from the Charge d'affaires of the Canadian Embassy in Washington D.C., expressing the Canadian Government's renewed concern about the impact of the proposed export project on the ANGTS project.²⁴ On February 7, 1989, the State Department submitted for the record its reply to the Canadian Charge's letter in which it pointed out that the U.S. had, as originally agreed, undertaken all actions necessary to facilitate construction of the ANGTS and eliminate regulatory obstacles to private financing.²⁵ Since both the State Department and Canadian Embassy letters merely restate their views that are already part of the record in this proceeding and since no one opposed the inclusion of their correspondence in the record, the DOE hereby admits these letters into the record.

Foothills filed on March 17, 1989, a motion to enter into the record a statement presented to the Alaska State Legislature by an official of Exxon Company, U.S.A. (Exxon U.S.A.), that expressed the view that it is not economically feasible at today's prices to develop North Slope gas for either the domestic or the Pacific Rim markets. Exxon U.S.A. stated that "[a]n assured market and a substantial real growth in energy prices will be required before a project to commercialize North Slope gas reserves can be economic" and that such conditions most likely will not exist until after the year 2000 and then will be much more likely for the domestic market than for the export market.²⁶ On March 21, 1989, Exxon U.S.A. also filed a copy of this statement to be added to the record. Yukon Pacific requested that the DOE

²² See the DOE's July 25, 1988, procedural order, at 11-15.

²³ DOE's December 5, 1988, procedural order, at 1-2.

²⁴ Letter dated January 9, 1989 from Mr. L.H. Legault to Mr. J.P. Ferriter.

²⁵ Letter dated January 30, 1989, from Mr. J.P. Ferriter to Mr. L.H. Legault.

²⁶ See statement of Mr. Judd Miller, Vice President of Exxon Company U.S.A., presented to the Senate Special Committee on Oil and

reject the statement on the grounds that the issues enumerated are irrelevant to this proceeding and the statement was filed late. The DOE concludes that admission of the statement would not adversely impact the proceeding or harm any party since it does not contain any relevant material that was not contained in prior submissions. Accordingly, the statement is hereby admitted into the record of this proceeding.

Finally, on June 28, 1989, a letter enclosing a "Third Amendment to Application" was submitted by Yukon Pacific. Although termed an amendment, Yukon Pacific's filing consisted entirely of newspaper and trade press articles concerning prospective LNG trade between Indonesia and certain Pacific Rim countries. On July 27, 1989, the DOE returned Yukon Pacific's filing after determining that it did not qualify as an amendment under the DOE's procedural rules because the information did not constitute a substantial change in the application and the material was not relevant and material to the resolution of the issues in this proceeding.

IV. Comments Received

A. Alaskan Northwest and Foothills

The ANGTS sponsors opposed the application in their interventions, in their responses to the July 25 procedural order, and at the public conference held in Anchorage. Their positions are fundamentally the same and are based primarily on their view that the proposed export could have an adverse impact on the ANGTS project. They advance several arguments. First, they argue that the application does not comply with the DOE's administrative regulations because it does not contain enough meaningful information for it to be properly evaluated. Specifically, they argue that the application does not include gas purchase or resale contracts, information on the gas conditioning facility expected to be used for the

(Footnote Continued)

Gas of the Alaska State Legislature on March 10, 1989.

²⁷ Atigun Pass is the highest point to be crossed by the TAGS pipeline in the Brooks Range. It is a narrow pinch point that currently accommodates the TAGS pipeline and a state highway, and is part of the ANGTS pipeline route.

TAGS project, a study regarding the feasibility of constructing both the proposed TAGS and ANGTS pipelines through Atigun Pass,²⁷ a complete environmental impact analysis of the project, a detailed description of the project's participants, and verifiable data demonstrating that the gas is not needed in the U.S.

Second, based on several energy supply studies and reports submitted with their comments, the ANGTS sponsors argue that North Slope gas would be needed and economically competitive in the lower-48 states by the mid-1990's. They contend that the excess demand in the lower-48 states cannot be met by other energy resources as or more efficiently than by the proposed export volumes. The ANGTS sponsors assert that substitute fuels for North Slope gas, such as coal and oil, would be environmentally inferior to natural gas, which burns cleaner. They maintain that increasing dependence on coal and oil would contribute to ozone layer depletion in the atmosphere, "acid rain", and the "greenhouse" problem of global warming,²⁸ and alternative gas supplies, such as development of Canadian frontier gas, would be more costly. In addition, they assert that the commitment of North Slope gas reserves to foreign interests would jeopardize national energy security by depriving the U.S. of a source of available reserves to offset the declining energy base in the lower-48 states, and by increasing U.S. dependence on oil imports.

Third, they contend that the TAGS project would impair completion of the ANGTS because there are not enough proven reserves of gas on the North Slope to support both the TAGS and the ANGTS projects. The ANGTS sponsors assert that they need 26-30 Tcf of reserves to justify construction. They argue that such an impairment would violate section 9 of ANGTA and also harm relations between the U.S. and Canada since it would constitute a breach of the

²⁸ Natural gas produces less carbon dioxide during combustion than does oil or coal, and carbon dioxide is one of the "greenhouse" gases that some scientists believe is a major contributor to possible global climate change. High emissions of sulphur dioxide and nitrogen oxide from burning coal are precursors to "acid rain."

1977 U.S./Canada Agreement on Principles.

Fourth, they contend that the proposed TAGS project would be economically and environmentally detrimental due to construction of the TAGS and the ANGTS in close proximity to each other and due to the duplication of facilities. (The northern portion of the TAGS pipeline would parallel the proposed route of ANGTS). They maintain that the TAGS Final Environmental Impact Statement (FEIS) issued by BLM in June 1988, is incomplete.²⁹ In particular, they assert that it does not address the environmental impact of or identify the gas conditioning facility that Yukon Pacific plans to use as part of the TAGS project.

Finally, the ANGTS sponsors contend that, if an export authorization is issued to Yukon Pacific, then the following conditions must be attached thereto: (1) that Yukon Pacific files in the record gas purchase, sales, and transportation contracts specifying the gas reserves to be purchased, transported, and sold; (2) that proven reserves needed to supply ANGTS will not be depleted by TAGS; (3) that ANGTS has first call on North Slope gas for delivery to the lower-48 states, if needed to meet contractual obligations and to preserve the project's economic viability; (4) that construction of ANGTS shall have priority over TAGS in order to avoid incurring additional costs that would have to be borne by U.S. customers; (5) that Yukon Pacific submit definitive data on the gas conditioning facility to be constructed and used by TAGS; and that Yukon Pacific also submit definitive data on Atigun Pass demonstrating the feasibility of constructing TAGS at that location; (6) that Yukon Pacific identify any planned simultaneous construction of TAGS and ANGTS, proposed cost sharing and joint use arrangements, and provide a definitive analysis of the net economic benefits of the proposed export; and (7) that any final authorization issued be subject to suspension, modification, or revocation upon a showing that continuation of the proposed export is no longer in the public interest.

B. PGT and PG&E (jointly)

PGT and PG&E, which initially did not comment on the application, subsequently submitted comments recommending that the proposed export authorization be denied, citing studies that indicate that gas supplies in the lower-48 states will not be able to satisfy domestic demand during the term of Yukon Pacific's proposed export. They contend that the proposed export will leave insufficient proven reserves to economically justify completion of ANGTS which depends on the availability of adequate Alaska reserves. In addition, they assert that conserving North Slope gas for domestic use enhances the energy security of the U.S., reduces U.S. reliance on imported oil, and provides an environmentally preferable energy source over oil and coal.

C. State of Alaska

The State of Alaska intervened because of its proprietary and governmental interests in the proposed TAGS project. The State supports Yukon Pacific's export proposal because the project would increase employment in the state, develop and broaden the market for North Slope gas, yield revenues to the state from gas royalties and production taxes, and diversify the state's economy from industries servicing the TAGS project. However, it has no preference for TAGS over ANGTS and asserts that the market will decide which (or how many) systems should be built. The State opposes the imposition of conditions on any export authorization issued to Yukon Pacific that would favor one gas development project over another.

D. Government of Canada

The Canadian Government expressed concern through the State Department that the TAGS project could impair the financial viability of the ANGTS in that there may not be adequate quantities of North Slope gas to support both the TAGS and ANGTS projects. Canada urged the U.S. to ensure the availability of adequate North Slope gas in order to maintain the commercial viability of the ANGTS project.

E. Exxon

Exxon, an owner and producer of North Slope gas, endorsed the President's *Finding* concerning North Slope gas. Exxon

²⁹ The BLM and USACE published a draft EIS for the TAGS project (52 FR 34424, Sep-

tember 11, 1987). An FEIS was issued June 11, 1988 (53 FR 24357, June 28, 1988).

urged that, if Yukon Pacific's application is approved, the authorization should be consistent with open, market-responsive development of Alaskan natural gas and not impose terms and conditions that would, in effect, place a stamp of approval on only one project or approach to development of Alaskan resources and discourage other projects or approaches.

F. TAPS Carriers and Alyeska (jointly)

The TAPS Carriers, users of the TAPS facilities, and Alyeska, operator of TAPS, took no position on whether the export authorization should be granted to Yukon Pacific but urged that any authorization be conditioned on review and approval of the engineering details of the TAGS facilities by the TAPS Carriers and by Alyeska. They stated that Yukon Pacific had not presented enough technical details for the commentators to be able to assess whether the proposed facilities would impede the safety, operation, or maintenance of TAPS.

G. Statoil

Statoil, which owns substantial reserves of natural gas on the Norwegian continental shelf, and plans to export and market LNG to the U.S. East Coast, stated that its LNG exports and those of other overseas suppliers would be able to meet any U.S. gas demand that might go unserved if North Slope gas is exported.

H. Yukon Pacific's Position

In support of its application, Yukon Pacific contends that there is no present or future domestic need for natural gas from the North Slope. To support its argument, Yukon Pacific submitted a study by the consulting firms of Dames & Moore and Decision Focus, Inc. (D&M study).³⁰ Yukon Pacific asserts that this study demonstrates that there are adequate gas supplies in the lower-48 states, Canada, and Mexico sufficient to meet U.S. demand in the foreseeable future without the Alaska gas that would be exported. The D&M study concludes that there will be no economic need for North Slope gas in the lower-48 states for at

least 30 years and that nearer supplies of Canadian Arctic gas would become competitive before North Slope gas.

Yukon Pacific also maintains that the export of North Slope natural gas to Pacific Rim countries would serve the public interest by reducing the U.S. trade deficit, strengthening international relations, and promoting Alaska's economic development. In addition, Yukon Pacific asserts that authorization of the TAGS project will inject an element of competition into the development of North Slope gas reserves that should prove healthy for both U.S. and Canadian natural gas markets. Further, Yukon Pacific argues that the TAGS project would not be detrimental to the interest of American consumers because the risks and costs associated with the construction and operation of the TAGS project, including the marketing of the gas, would be borne by the project's private sponsors and the foreign purchasers of the gas.

With respect to the availability of North Slope gas for TAGS and ANGTS, Yukon Pacific asserts that TAGS and ANGTS are not competitors since there are sufficient gas reserves on the North Slope for both projects. Moreover, Yukon Pacific asserts that the ANGTS project does not have an exclusive right to or first call on the reserves. Yukon Pacific argues that section 12 of ANGTA demonstrates that the U.S. Congress envisioned that North Slope gas might be exported and that the President's *Finding* determined that the public interest will be served by exports of North Slope gas.

With regard to construction compatibility between TAGS and ANGTS, as well as construction priority and cost allocation for jointly used facilities, such as the proposed Alaska Gas Conditioning Facility,³¹ Yukon Pacific contends that these matters are outside the jurisdiction of the DOE. Further, Yukon Pacific states that the gas conditioning facility is not part of the export project because it expects to purchase the gas from the North Slope producers after the gas is conditioned.

³⁰ See Dames & Moore and Decision Focus, Inc., *Analysis of Alaska Gas Market Potential In The Lower 48 States: Domestic Effect of Yukon Pacific's Proposed LNG Export* (August 22, 1988), included as Exhibit R to *Initial Comments of Yukon Pacific Corporation*, filed August 24, 1988.

³¹ As part of the ANGTS, Alaskan Northwest holds a conditional certificate from the FERC to construct and operate a gas conditioning plant, designated the Alaska Gas Conditioning Facility, on the North Slope at Prudhoe Bay.

Yukon Pacific states that it would accept two conditions on any grant of export authority: one condition would require that the LNG sales contracts be filed with the DOE after they have been executed, and the second condition would prohibit Yukon Pacific from passing on to consumers in the lower-48 states any of the risks or costs associated with the TAGS project. Yukon Pacific opposed the other conditions that the ANGTS sponsors requested because those conditions are either outside the DOE's jurisdiction and have no basis in law, or constitute improper government financing assistance to the ANGTS.

Finally, Yukon Pacific asserts that the information submitted in its application meets the requirements of section 590.202 of the DOE's administrative procedures and notes that those procedures give the DOE the flexibility to determine what information is required from an applicant based on the nature of the import or export requested.

V. Decision

Yukon Pacific filed its application for authorization to export North Slope gas under section 3 of the NGA.³² Section 3 creates a statutory presumption in favor of the approval of an export application, a presumption that must be overcome by evidence in the record of the proceeding

that the proposed export will not be consistent with the public interest.³³ Opponents of an application bear the burden of overcoming this presumption.

In judging whether to authorize a proposed export, the DOE is guided by Delegation Order No. 0204-111.³⁴ This order designates domestic need for the natural gas proposed to be exported as the only explicit criterion that must be considered in determining the public interest. In addition to domestic need, the DOE will consider other factors to the extent they are shown to be relevant to a public interest determination. Furthermore, in evaluating exports, the DOE is mindful of the broad energy policy principles set forth in the DOE's natural gas import policy guidelines. While those guidelines deal with imports, the principles are applicable to exports as well. The guidelines establish the policy that market forces will generally bring about results more in the public interest than will extensive regulation.

In addition to the framework of the NGA, this particular export proposal must also be viewed in light of the framework of ANGTA. ANGTA generally affects all actions that might relate to the ANGTS and, in particular, provides an additional statutory requirement for the export of North Slope gas.

³² Section 3 provides:

[N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order from the [Federal Power] Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate . . . 15 U.S.C. Sec. 717b. With the adoption of the Department of Energy Organization Act in 1977 (DOE Act), Pub. L. No. 95-91, Congress transferred authority for all regulation of natural gas imports and exports under the NGA, including section 3, from the FPC to the Secretary of Energy. See sections 301(b) and 402(f) of the DOE Act, 42 U.S.C. 7151(b) and 7172(f). In Delegation Order No. 0204-127, the Secretary delegated to the Assistant Secretary for Fossil Energy the authority "to regulate natural gas imports and exports, pursuant to the Natural Gas Act." (Issued February 7, 1989, published at 54 FR 11436, March 20, 1989.)

³³ In *Panhandle Producers and Royalty Owners Association v. ERA*, 822 F.2d 1105 (D.C. Cir. 1987), the Court found that section 3 of the NGA "requires an affirmative showing of inconsistency with the public interest to deny an application" and that a "presumption favoring . . . authorization . . . is completely consistent with, if not mandated by, the statutory directive."

³⁴ 49 FR 6690, February 22, 1984. In granting the Assistant Secretary for Fossil Energy the NGA authority over natural gas imports and exports, the Secretary directed the Assistant Secretary to exercise this authority in accordance with the policies and practices that the ERA followed in regulating natural gas imports and exports under Delegation Order No. 0204-111. Thus, while the Assistant Secretary is granted the NGA authority entirely by Delegation Order No. 0204-127, the exercise of this authority takes into account the same factors prescribed by the Secretary to the ERA for consideration in connection with Delegation Order No. 0204-111.

A. Domestic Need

Yukon Pacific proposes to export up to 16.5 Tcf of gas as LNG over a 25-year period. This amount would be equivalent to about three percent of the total U.S. consumption of natural gas projected between 1996 and 2021. In the July 25 procedural order, the DOE set forth its three-pronged approach for evaluating domestic need. First, the DOE determines whether national or regional demand can reasonably be expected to exceed anticipated available domestic supplies over the term of the proposed export.³⁵ If there is a reasonable expectation of demand in excess of available domestic supplies, the DOE determines the extent to which this excess demand can be met by other energy sources as or more efficiently than by the proposed export. If there are sufficient alternative sources, the DOE analyzes whether there is any reason the public interest requires the proposed

export, in particular, be used to meet the excess demand.

Yukon Pacific, Alaskan Northwest, and Foothills presented evidence concerning the need for North Slope natural gas. For the most part, this evidence relates to studies which purport to demonstrate when North Slope natural gas would become competitive in the lower-48 states. These studies differ greatly in their findings. In general, the studies submitted by Yukon Pacific indicate that North Slope gas would not be competitive during the entire term of the proposed export, while those submitted by the ANGTS sponsors indicate that it would be competitive as early as the 1990's.

While studies such as those submitted in this proceeding are useful in assessing overall macro-economic conditions and probable market trends under certain scenarios, they are not as useful in assessing the future of particular energy projects.³⁶ As Alaskan Northwest stated in its reply

³⁵ Regional need is not an issue in this proceeding since no one asserts North Slope natural gas could be used to meet the energy needs of the populated areas of Alaska. There is no existing or contemplated delivery system to bring North Slope natural gas to these areas.

³⁶ The DOE is aware that many economic predictions do include North Slope gas as a supply used to meet domestic demand at some point in the future. The DOE does not equate these predictions with a demonstration that North Slope gas is needed in domestic markets. A prediction by an economic model that a particular gas supply will be used to meet demand does not mean that there are not adequate supplies of reasonably priced gas from other sources to meet the demand or that the other supplies may not actually cost less. Rather, it means the economic model has classified that particular supply as more "competitive" than supplies from other sources. Such a "competitive" classification is based entirely on the assumptions of the model and, at best, is only a rough approximation of the decisions that a competitive market actually will make. Unlike the real world where private parties take a hard look at the actual costs of bringing competing supplies to market, an economic model selects the "competitive" supply on the basis of assumptions about the general costs of broad categories of gas, expected exploration and drilling activity, the availability of transportation systems, and other factors, including the anticipated export policies of foreign governments many years in the future. In the case of ANGTS, most economic models put the cart before the horse since they automatically assume North Slope gas will be used in the

domestic market and then speculate when producers, pipeline sponsors, and financial institutions will agree that the market justifies the commitment of billions of dollars to provide the means necessary to make this "a priori" modeling assumption feasible in the real world.

Rather than demonstrate that a gas supply is needed, economic models indicate when the market may consider the use of a particular gas supply. In the case of North Slope gas, this function is especially suspect. Unlike other gas supplies, North Slope gas is predicted to be used in domestic markets not on the basis of comparisons to other supplies, but rather on the basis of the assumption when market conditions will justify the construction of ANGTS. In light of the history of ANGTS, this substitution of conjecture by economists for actual decisions by the private parties directly involved with ANGTS cannot be treated as having a high degree of certainty. ANGTS originally was scheduled to bring North Slope gas to the domestic market by the mid-1980's. Work on ANGTS, however, was suspended in 1982 and no commitments concerning its resumption have been made. Indeed, the uncertainty surrounding when and where North Slope gas will ultimately be used was emphasized in the recent action by the Energy Information Administration of the DOE to drop North Slope gas from U.S. proved reserves "because large uncertainties exist about the availability of a gas transportation system or other marketing alternatives for the bulk of North Slope gas." See advance summary, *U.S. Crude Oil, Natural Gas, and Natural Gas Liquid Reserves, 1988 Annual Report*, DOE/EIA-0216(88), September 1989, at 1.

comments, "The world is simply too complex, too subject to change from unforeseeable actions by others and from uncontrollable forces to forecast with confidence 20 years or so into the future. Projections even 12 years ahead, to the turn of the century, realistically must be viewed with great caution."³⁷ In fact, the inherent imprecision of using economic studies to predict the performance of a particular project is one reason that led to the shift from a government-mandated regulatory approach to a market-oriented approach that leaves private commercial parties with the flexibility to determine the basics of their projects.

The submitted studies have been helpful, however, in evaluating domestic need since they all contain extensive information on supplies of various energy sources and anticipated demand. The DOE's review of the studies, set forth below, indicates that there are sufficient energy sources to meet domestic need without the use of North Slope natural gas.

1. Domestic Supplies

The D&M study, which was provided by Yukon Pacific, analyzed and compared several domestic gas resource forecasts published by various agencies and organizations. In particular, the D&M study focused on assessments produced by the DOE's Office of Policy, Planning, and Analysis (DOE/Argonne),³⁸ the Potential Gas Committee (PGC),³⁹ and the U.S. Geological Survey (USGS).⁴⁰ These three assessments estimate that there is in the lower-48 states a natural gas reserve and resource base that could be recovered ranging from 534 Tcf (USGS) to 1,059 (DOE/Argonne).⁴¹ PGC's estimate of 778.6 Tcf lies between the USGS and DOE totals. The USGS based its estimate of economically recoverable resources on a significantly lower wellhead price

(\$1.80/Mcf) than the price upon which the DOE/Argonne estimate is based. The lower price assumption in the USGS estimate, therefore, reduces the quantity of gas that is economically viable and leads to a lower total resource estimate. In addition, the varying estimates include different components of the resource base.

The DOE made a comparative evaluation of the results of the particular resource appraisals using the DOE/Argonne assessment as a benchmark because it contained resource categories not included in other gas resource estimates. The DOE/Argonne study used a new resource category "reserve growth," which refers to the additions to reserves that result from tapping additional gas sources located within known reservoirs, but not previously counted as reserves. In addition, the DOE/Argonne study estimates the potential for unconventional gas sources. The USGS study, for example, excludes all unconventional gas, including gas from tight sands, Devonian shale, coal seams and enhanced recovery—despite the fact that such gas is now being produced commercially. To put the USGS and PGC appraisals on an equivalent basis with the DOE/Argonne appraisal, 439 Tcf of gas from unconventional reserves and gas from infill drilling was added to the USGS estimate and 180 Tcf from infill drilling was added to the PGC estimate (the PGC estimate already includes an undefined quantity of unconventional resources). Adjusted, the USGS estimate (973 Tcf) and the PGC estimate (958.6 Tcf) are comparable to the DOE/Argonne estimate (1059 Tcf).

The demand forecasts that DOE examined to compare with the USGS, DOE/Argonne, and PGC resource appraisals were developed by the Gas Research Institute (GRI),⁴² the American Gas Association (AGA),⁴³ and the Data

³⁷ See Reply Comments of Alaskan Northwest, at 27.

³⁸ *An Assessment of the Natural Gas Resource Base of the United States* (May 1988), prepared by Argonne National Laboratory for the DOE's Office of Policy, Planning, and Analysis.

³⁹ PGC, *Potential Supply of Natural Gas in the United States*, Colorado School of Mines, December 1986 and April 1987.

⁴⁰ USGS Circular 860 (1981), *Estimates of Undiscovered Recoverable Conventional Resources of Oil and Gas in the United States*.

⁴¹ See D&M study, at 4-3.

⁴² See 1988 Baseline Projection of U.S. Energy Supply and Demand, attached as Exhibit H to Reply Comments of Alaskan Northwest.

⁴³ See the 1988 American Gas Association T.E.R.A. Analysis (January 15, 1988) attached as Appendix F to *Additional Comments of Foothills Pipe Lines (Yukon) Ltd.*, filed August 24, 1988.

Research Institute (DRI).⁴⁴ Portions of the studies by GRI, AGA, and DRI are appended to the comments of Alaskan Northwest and Foothills. Domestic natural gas consumption according to GRI was 17.6 quadrillion Btu (quads) in 1987 (a quad is approximately equivalent to a Tcf).⁴⁵ GRI projects consumption to grow at an average annual rate of 0.4 percent and reach 19.4 quads in 2010. According to projections by the AGA and DRI, natural gas consumption by 2010 is expected to be 21.7 quads and 17.6 quads, respectively.⁴⁶

The DOE adopted the highest of the projections for U.S. gas consumption in 2010 of 21.7 quads (that by AGA), which assumes a 1.0 percent increase per year in consumption after 1987, as a basis for comparing available supply to expected demand. Using 18.0 quads for consumption in 1988 as a starting point,⁴⁷ if expected growth is 1.0 percent per year, the DOE calculated that annual consumption would reach 25.0 quads by 2021 (the final year of the export project assuming Yukon Pacific begins exports in 1996 and operates for 25 years). Under this premise, cumulative consumption during the period 1988-2021 would be 725 quads (Tcf), well below the most conservative of the resource estimates.

The DOE also considered the economics of exploring for and developing new domestic supplies, focusing on the wellhead acquisition price of gas produced in the lower-48 states. In addition to its estimates for recoverable gas resources, the DOE/Argonne study provided an estimate of their availability by wellhead price. The results of the DOE/Argonne assessment reveal that more than half of the total gas resources evaluated in the lower-48 states, or 583 Tcf of gas, would be economically recoverable (including finding costs) at less than \$3.00/Mcf (1987 dollars). An additional 174 Tcf of gas was judged economically recoverable in a price range of \$3.00 to \$5.00/Mcf.

That would be enough gas (757 Tcf) that could potentially be recovered in the lower-48 states at costs below \$5.00 per Mcf (1987 dollars) to meet projected U.S. demand through the year 2021, whether or not North Slope gas is exported to the Pacific Rim.

The ANGTS sponsors assert that DOE should only consider proven natural gas reserves, rather than estimates of the total resource base, in assessing domestic need because the amount of non-proven reserves is subject to wide disagreement and periodic fluctuation. That approach would represent an overly conservative view of available natural gas supplies. The level of reserve additions, and ultimately the level of reserves, is dependent upon the amount of drilling which, in turn, is sensitive to advances in gas recovery technologies and is stimulated by the price of gas. Gradual shrinkage and eventual disappearance of the present supply surplus or "gas bubble" over the next few years, combined with the prospects for substantial increases in gas demand in certain market sectors should materially improve incentives to drill new wells. In addition, although the USGS, PGC, and DOE/Argonne resource estimates do not address the timing of production or the availability of transportation, all volumes of future natural gas supply beyond proven reserves included in the studies are based on information derived from past and current experience in gas production and reservoir development and reflect a conservative view of recoverability. Gas supply assumptions that focus solely on proved reserves and do not take into account the potential for reserve additions and production experience would severely distort forecasts of domestic need.

To support its argument that the proposed exports will be needed in the lower-48 states, Alaskan Northwest quotes from a report by Jensen Associates, Inc. (Jensen study).⁴⁸ Jensen Associ-

⁴⁴ See Data Research Institute *Natural Gas Review* (Summer 1988) attached as Appendix G to *Additional Comments of Foothills*.

⁴⁵ See GRI 1988 *Baseline Projection of U.S. Energy Supply and Demand*, at 5-6, *supra*.

⁴⁶ See AGA T.E.R.A. Analysis, at 24, *supra*. See also, DRI *Natural Gas Review*, at 7, *supra*.

⁴⁷ See DOE, Energy Information Administration, *Natural Gas Monthly*, July 1989, at 6.

⁴⁸ See *Assessment of the Domestic U.S. Need For North Slope Natural Gas Reserves*, Jensen Associates, Inc., included as Exhibit A to *Comments of Alaskan Northwest Natural Gas Transportation Company in Response to Order of the Economic Regulatory Administration*, filed August 24, 1988.

ates, Inc., was retained by Alaskan Northwest to analyze Yukon Pacific's application. The quote indicates that by 1996, "at present rates of consumption, the U.S. will have consumed a volume of gas equivalent to 79% of [its] present lower-48 proved reserves," implying that the supply of proven reserves will be nearly depleted.⁴⁹ In addition, a second Jensen report indicates that, in each of the last 20 years but one, the gas industry has not added enough gas reserves to replace production and that production is expected to continue to decline in certain regions.⁵⁰

It is true that if there are no reserve additions, then proved reserves would be zero at the end of the next decade. However, no expert we know of expects that U.S. reserves will be depleted by the year 2000. Even the Jensen study conditions the statement about consumed proven reserves by concluding that the existence of a gas surplus in 1996 "will be dependent on the effectiveness of the industry in exploring and developing [the Nation's] remaining gas resource base."⁵¹ The fact is, over time, more reserves are added to offset proven reserves drawdown. As Yukon Pacific points out, "[a forecaster] could have made an alarmist statement back in 1977 that by 1986, 85% of the U.S. proven reserves will be consumed, and that statement would be proven correct."⁵² The reality is that, during the same period, additions to proven reserves in the lower-48 states were such that as of December 31, 1988, the amount of proven reserves was 159 Tcf, down only 9 percent from 1977.⁵³

⁴⁹ *Id.*, at 10. Reserve and production statistics of the DOE's Energy Information Administration (EIA) show that the reserves-to-production ratio (R/P), that is, the relationship between natural gas proved reserves and production rates, over the years 1977-1988 fluctuated between 10 to 1 and 12 to 1 each year (increasing production rates relative to proved reserves or a decline in proved reserves causes a falling R/P ratio). See advance summary, *U.S. Crude Oil, Natural Gas, and Natural Gas Liquid Reserves, 1988 Annual Report*, DOE/EIA-0216(88), September 1989, at 3. With this in mind, all that the 79% figure in the Jensen study actually indicates is that in 1988 the U.S. R/P ratio was about 10 to 1 and, therefore, the U.S. could be expected to consume about 10 percent of its proved reserves each year through 1996.

Furthermore, over the last nine years (1980-1988), proved gas reserves in the lower-48 states in fact declined only a total of about 4 percent.⁵⁴ The relatively stable reserve level has been due to the high reserve replacement rate which, during this period, averaged 93 percent in the lower-48 states.⁵⁵ The high average gas reserve replacement factor indicates the success of exploration and development activity in adding new gas reserves. Although drilling activity has declined since 1981, the DOE believes that statutory and policy changes in the regulatory framework for natural gas will open up marketing opportunities for companies throughout the industry and, as the "gas bubble" disappears, this should encourage the exploration necessary to stem the downward trend in levels of drilling.

Based on its analysis of the submitted studies, the DOE concludes that domestic need for natural gas during the term of Yukon Pacific's export proposal could be met by production from reservoirs in the lower-48 states without North Slope natural gas.

2. Alternative Supplies

The DOE believes that it is not necessary for the purpose of its section 3 determination to find that all future U.S. natural gas demand will be met entirely by production in the lower-48 states. Although gas produced in the lower-48 states is currently the primary source of natural gas supply, imports (mostly from Canada) meet about seven percent of U.S. gas requirements and they are projected to play an increasing role. The AGA, GRI, and DRI forecasts indicate that by

⁵⁰ See *A Critique of Yukon Pacific Corporation's Analysis of Domestic Need For North Slope Natural Gas*, attached as Exhibit G to Reply Comments of Alaskan Northwest, at 5.

⁵¹ *Id.*

⁵² See Reply Comments of Yukon Pacific, at 26.

⁵³ See *U.S. Crude Oil, Natural Gas, and Natural Gas Liquid Reserves*, DOE/EIA-0216(87), 1987 Annual Report, at 82; see also advance summary to 1988 Annual Report, at 8.

⁵⁴ *Id.*

⁵⁵ See *U.S. Crude Oil, Natural Gas, and Natural Gas Liquid Reserves*, (1977 through 1987) annual reports, DOE/EIA-0216; see also advance summary to 1988 annual report, *supra*.

the year 2010, from 3-to-4 Tcf annually of domestic market requirements will be supplied from sources external to the lower-48 states.⁵⁶ Yukon Pacific asserts that future domestic need in excess of lower-48 states' supplies can be met by non-Alaskan sources. The ANGTS sponsors maintain that both foreign imports and North Slope gas will be needed to meet future excess domestic need.

Pipeline deliveries from Canada are expected to remain the predominant supplemental supply source, with other imports, such as gas from Mexico or LNG from Algeria, Norway, or other foreign sources also contributing to total U.S. supply. Canada's present natural gas situation may be characterized as one of supply excess to that country's internal needs. The D&M study presented by Yukon Pacific examined assessments and projections of Canada's natural gas supply and resource based published by AGA,⁵⁷ the Canadian Energy Research Institute (CERI),⁵⁸ the U.S. Office of Technology Assessment,⁵⁹ the Canadian NEB,⁶⁰ and the Energy Modeling Forum.⁶¹ The CERI report also estimated domestic Canadian demand. The estimates of marketable natural gas range from about 97 Tcf to 197 Tcf. Recoverable resource estimates range from 205 Tcf to 426 Tcf. With a projected domestic demand of approximately 65 Tcf (CERI) between 1985 and 2010 and an R/P ratio of greater than 30, the DOE concludes that Canada has a large quantity of natural gas potentially available for export to the U.S. over the next few decades.

Although Mexico's current energy export policy favors using natural gas for its domestic energy needs while reserving oil for exports, Mexico has a large natural gas resource base potentially available to the U.S. market. Mexico's annual domestic consumption is about 1.25 Tcf.⁶² The

D&M study indicates that Mexico's proved reserves totaled 76.5 Tcf in 1986 with a R/P ratio of 61. There are no recent estimates for undiscovered recoverable resources, but they were estimated to be over 289 Tcf in 1985. Mexico's policy of limiting gas exports might well change in the longer term to take into account general gas availability, gas export revenue considerations, and physical limitations on using the gas internally.

Numerous countries are capable of supplying LNG to the U.S. and have expressed a serious interest in doing so. There are four LNG receiving and gasification terminals in the U.S. located on or accessible to the East Coast. They have a combined daily capacity of about 2 Bcf. Of these four, only Distrigas of Massachusetts Corporation's facility at Everett, Massachusetts, is currently operating. It brings Algerian LNG imports into the lower-48 states. Trunkline LNG Company has requested FERC permission to begin operating its facility at Lake Charles, Louisiana, in late 1989 to receive Algerian LNG. There is a potential for further LNG supplies for the U.S. after 1990, especially in the Atlantic region, from Algeria, Norway, Nigeria, Venezuela, and the Caribbean, because of the surpluses that exist in these relatively low-cost production areas. For example, development of the North Sea fields has resulted in vast additional reserves of gas that could be marketed in the U.S. Statoil is in the formative stages of arranging for importation and marketing of LNG on the East Coast. In the case of Statoil, Norwegian reserves currently amount to about 110 Tcf. Of this total, only 30 Tcf are presently committed by contract to existing purchasers. According to Statoil, "when the U.S. market requires additional gas supplies, Statoil and other over-

⁵⁶ See Appendix F to Additional Comments of Foothills, the Table entitled "Natural Gas Supply", at 24 and Appendix G, at 7. See also Exhibit H to Reply Comments of Alaskan Northwest, at 13.

⁵⁷ *The Gas Energy Supply Outlook 1987-2010*, (October 1987).

⁵⁸ *Towards a Continental Natural Gas Market: Historical Perspectives and Long-Term Outlook. Executive Summary*, Study No. 26 (February 1988).

⁵⁹ *U.S. Natural Gas Availability, Gas Supply through the Year 2000*, February 1985.

⁶⁰ *Canadian Energy: Supply and Demand 1985-2005*, October 1986. See also, *National Energy Board Reasons for Decision in the Matter of Review of Natural Gas Surplus Determination Procedures*, September 1987a.

⁶¹ *EMF9 Summary Report-North American Natural Gas Market-Preliminary Draft*, August 1988.

⁶² See Exhibit A attached to January 24, 1989, *Prepared Statement of Vernon T. Jones*, Chairman of Board of Partners, Alaskan Northwest, which was submitted at the Alaska public conference, at 9.

seas LNG interests will be able to meet some or all of this demand."⁶³

In light of the data submitted by all of the parties, the DOE concludes that there would be sufficient North American and overseas gas supplies to meet potential domestic demand without North Slope gas.

3. Effects on Quantity, Quality, and Price

Since the record indicates that available energy supplies are sufficient to meet domestic need, the DOE has considered whether there is any reason that North Slope natural gas, rather than other energy supplies, should be used to meet the anticipated demand. The public interest lies in ensuring the availability of adequate supplies at competitive prices. Therefore, the DOE has considered whether there are any effects on supplies or prices that would result directly and uniquely because of the proposed export. The DOE also has considered whether the proposed export might have a direct and unique effect on matters such as the environment or energy security.

For the most part, the examination of these potential considerations corresponds to the provisions of section 12 of ANGTA, which prohibit exports of North Slope natural gas unless the President finds such exports will not affect American consumers adversely by diminishing the quantity or quality of available energy supplies or increasing the total price of available energy. President Reagan fulfilled this statutory condition precedent in 1988 when he issued the *Finding* in which it was determined that exports of North Slope natural gas will not affect American consumers adversely because there are adequate supplies of secure, reasonably-priced energy available to American consumers. While this generic finding by the President necessarily provides the DOE with significant guidance, the DOE has examined these matters of supply, price, and qualitative effect in the particular context of Yukon Pacific's application under section 3 of the NGA.

a. Quantity

The quantity of energy available to American consumers is not necessarily

diminished merely because a particular energy supply is exported. Depending on the market, the alternative to export may be to leave an energy supply unused altogether. Moreover, in the context of global energy interdependence, the export of a certain energy source may, by increasing worldwide supplies of energy, result in making other energy supplies available to American consumers. Accordingly, with respect to North Slope gas, it would be unduly simplistic to conclude that exports will necessarily diminish the quantity of energy available to American consumers. In this case, the alternative to exporting North Slope gas may be that it remains undeveloped, and therefore available to no one; conversely, exporting such gas may make available on the American market gas from foreign sources that would otherwise have gone to the Pacific Rim.

In the final analysis, the question whether the proposed export of North Slope gas will *adversely* affect the quantity of energy available to American consumers depends on whether the export will cause available supplies to be inadequate to meet domestic demand. As discussed previously, there is an adequate supply of domestic gas other than North Slope natural gas to meet domestic need; furthermore, alternative supplies, such as Canadian gas, are more than adequate replacements for any North Slope natural gas that might be exported. The DOE therefore believes that the quantity of energy available to American consumers will not be adversely affected by the proposed export.

b. Quality

There is no evidence that the export of North Slope natural gas will diminish the "quality" of energy available to American consumers. Quality is an amorphous term that can denote a wide range of effects. For the most part, the ANGTS sponsors assert that the proposed export could result in detrimental qualitative effects in the areas of the environmental and energy security.

The purported harm to the environment would result from the use of other fossil fuels, such as coal, to meet excess demand. While the DOE does not dispute

⁶³ See *Initial Comments of Statoil North America, Inc.*, filed August 24, 1988, at 5.

that some excess demand may be met by energy sources other than natural gas, it does not believe the proposed export will be the reason for such a decision. Since the DOE has found that natural gas demand in the lower-48 states can be satisfied by supplies exclusive of the North Slope, any decision by American consumers to use other forms of energy will result from factors that relate to the desirability of natural gas when compared to other energy options, not because the proposed export makes gas unavailable.⁶⁴

The ANGTS sponsors also assert that U.S. energy security would be impaired from consequent importing of natural gas or crude oil if the volumes proposed for export were unavailable to meet domestic demand. Even if the proposed export tends to increase energy imports, the DOE does not necessarily equate such a situation with energy insecurity. Energy security must be viewed in global terms: "Individual nations cannot go it alone; they are inevitably affected by the decisions and reaction of all other major market participants."⁶⁵

Finally, North Slope natural gas is an integral part of the North American energy market resource base. The efficient development of North Slope gas, which includes potential exports, will contribute to the overall performance of the North American energy market. Any decision to export some North Slope gas will result from a market decision that other portions of the energy market can better serve the needs of American consumers. DOE believes that true energy security lies in encouraging the most efficient operation of the North American and global energy market.

c. Price

In determining whether the proposed export would result in higher prices to American consumers, the DOE has

focused on the structure of the natural gas market to evaluate the likelihood that the proposed export will affect market conditions so that consumers pay more than they would if North Slope gas were not exported.⁶⁶ In general, conditions in the domestic market will establish the price for whatever natural gas is used to meet domestic need, regardless of the source of the gas. Neither North Slope gas nor any other specific supply will be the tail that wags the market price of natural gas. The export of a particular gas supply, such as North Slope gas, would exert upward pressure on the market price only if there were not adequate alternative supplies of energy to meet domestic need at a market-responsive price. Even then, the export would exert upward pressure only if the costs of producing and delivering the exported gas to the domestic market would be less than the costs of the energy supplies actually used to meet the marginal demand.

The DOE's supply/demand analysis indicates there are adequate supplies to meet future demand without North Slope gas. While future market prices will be determined by a variety of factors (including the highly variable cost of crude oil), the DOE believes that it is reasonable to assume that these supplies will be available at a market-responsive price. The DOE/Argonne study indicates that 583 Tcf of gas will be available from reserves in the lower-48 states at less than \$3.00/Mcf, while an additional 174 Tcf of gas will be available in a price range of \$3.00 to \$5.00/Mcf.

Even if imports of gas are used to meet some demand, the DOE does not believe that they would be more costly than North Slope gas. In light of the location of North Slope natural gas and the conditions under which it would be produced and delivered to the lower-48 states, the DOE believes that the costs of producing

⁶⁴ A study prepared by Argonne National Laboratory for the ERA was included in the TAGS EIS that analyzed the environmental effects of exporting North Slope gas instead of using it domestically. The analysis concluded that using other fossil fuels, such as coal, to meet a shortfall in supply equivalent to the proposed exports would have minimal effect on air pollution levels. See *An Assessment of the Potential Environmental Residuals in the Lower-48 States Arising from Alaskan Natural Gas Exports* (July 30, 1987), attached as

Appendix D to the draft EIS. The study was incorporated by reference in Appendix K of the FEIS.

⁶⁵ U.S. Department of Energy, *Energy Security: A Report to the President of the United States*, March 1987, at 222.

⁶⁶ Action under the NGA may "rely on reasonable economic propositions." See *Michigan Consolidated Gas Company v. FERC*, No. 88-1062, slip op., at 14-15 (D.C. Cir. August 18, 1989).

and delivering most alternative supplies, especially Canadian gas, would be comparable to or lower than the cost of North Slope gas. Accordingly, if North Slope gas is exported, there should not be any marginal upward price pressure and thus, there should be no disruption in market conditions which would effect the efficient operation of market forces and result in higher prices to American consumers.

The DOE has reviewed very carefully the economic analyses submitted by Yukon Pacific and the ANGTS sponsors that purport to show whether North Slope gas will be competitive with other gas supplies and whether its price will be higher or lower than other supplies.⁶⁷ For the most part, the DOE finds these analyses represent a duel between economists over economic models, rather than a comparison of the actual production and delivery costs of North Slope gas with other gas supplies. Neither Yukon Pacific nor the ANGTS sponsors have analyzed the costs of North Slope gas and alternative supplies in a manner that sets forth the rationale for calculating those costs or the actual cost factors used in the calculations.⁶⁸ Their conclusions are not persuasive concerning the comparative costs of North Slope gas and other supplies or the effects of the proposed export on domestic prices and do not constitute the substantial evidence necessary to overcome the DOE's analysis of the fundamental market conditions, the section 3 presumption in favor of export approval, and the President's Finding.

In summary, the DOE has determined that North Slope natural gas is not required to meet domestic need because there are adequate supplies of gas available in the lower-48 states, as well as secure foreign supplies, and that the proposed export will not adversely affect the

quantity, quality, or price of energy sources available to American consumers.

B. Other Public Interest Considerations

Although domestic need is the only factor specified by Delegation Order No. 204-111, the DOE considered the potential effects of the proposed export on the other aspects of the public interest. In particular, the DOE examined the effects on American consumers, energy production, the State of Alaska, international relations, and the environment.

1. American Consumers

A primary purpose of the NGA is protection of American consumers. In essence, the evaluation of domestic need is an examination of the effects of the proposed export on American consumers. As discussed in Section V.A., *supra*, the proposed export will not result in inadequate supplies or higher prices and thus will not be inconsistent with the public interest because of adverse effects on consumers.

During this proceeding, the ANGTS sponsors asserted that the proposed export may be inconsistent with the public interest because American consumers might somehow subsidize the export project. The DOE believes that those involved in the proposed export should bear the risk of the project and that none of the costs of the project should be borne by American consumers. Yukon Pacific has indicated that it does not expect American consumers to bear any of the risks or costs of the project and will not object to a condition that sets forth this principle. Accordingly, the DOE is attaching a condition to its approval of the proposed export that no cost of the export project may be recovered from American consumers. To assist in monitoring compliance with this condition, the DOE is requiring the submission of all contracts and other documents for the

⁶⁷ As discussed previously, "competitive" under the assumptions of an economic model does not necessarily translate into competitive in the real world. See *supra* note 37.

⁶⁸ For example, no party has provided any reason to believe that producers (and the State of Alaska) would be willing to receive wellhead prices for North Slope gas that are substantially lower than the wellhead price of other gas supplies. See Table 6-7 of the D&M study. Likewise, the DOE can find no discussion in the record that compares the actual costs of

delivering North Slope gas and Canadian gas to the lower-48 states or that provides a basis for assuming that the same factors that might lower the delivery costs of North Slope gas would not also operate to lower the delivery costs of Canadian gas. Rather than discuss such basic issues, the economic experts representing Yukon Pacific and the ANGTS sponsors chose to spar over whether to use the cost of service tariff for the ANGTS project that is on file with the FERC or a leveled cost tariff.

acquisition, transportation, and sale of North Slope gas in connection with the export project, when these documents are executed.

The DOE recognizes that situations may arise where American consumers could receive natural gas directly as a result of the export project. For example, consumers in Alaska may receive some North Slope natural gas transported through TAGS. The condition against the recovery of costs from American consumers is not intended to prevent Yukon Pacific from receiving payment for the sale of North Slope gas in the U.S. and from recovering the cost associated with those facilities used and useful for supplying such gas to consumers.

2. Energy Production

The U.S. public has a strong interest in the efficient production of the Nation's energy resources. While the interest of consumers and producers sometimes must be balanced in proceedings under the NGA, they coincide in this proceeding. Approval of the proposed export will have the beneficial effect of encouraging increased development of energy resources in Alaska.

The ANGTS sponsors question whether competition will spur exploration for and development of North Slope natural gas and they have indicated that the proposed export might result in the non-production of some North Slope gas. The DOE does not accept this contention.

Thirteen years have passed since the passage of ANGTA and no North Slope natural gas has been produced commercially. The introduction of competition will encourage a realistic assessment of the potential of North Slope natural gas and its early and more efficient development. It also will provide an incentive for discovering and developing additional reserves of natural gas on the North Slope. Several estimates have been published concerning the amount of North Slope proven reserves. Estimates published by the DOE's Energy Information Administration (EIA), the Alaska Oil and

Gas Conservation Commission (AOGCC), and the Alaska Department of Natural Resources (ADNR) indicate a range of proven reserves from 22.5 Tcf (AOGCC) to 33.9 Tcf (ADNR).⁶⁹ The EIA estimate of 24.6 Tcf lies between the AOGCC and ADNR estimates. The DOE/Argonne appraisal estimates the undiscovered recoverable gas for the onshore and offshore areas of the North Slope to be 89 Tcf. By combining these figures for proven reserves and potential gas reserves, the total gas resources of the North Slope would be in a range of 111.5 Tcf to 122.9 Tcf.

Producers of North Slope natural gas have supported approval of the proposed export. This support has not been based on their involvement in the export project, but rather on their belief that competition for North Slope natural gas is the best means to ensure its expeditious and efficient development. Indeed, Exxon has supported approval of the export in order to spur market competition and development efforts, even though its current analysis indicates the most likely market for North Slope gas is the lower-48 states.

3. State of Alaska

In making the public interest determination in this proceeding, the DOE has been especially mindful of the effects of the proposed export on the State of Alaska and its citizens. The State strongly supports approval of the proposed export because it would promote the development of Alaska's natural resources. The State indicates that the export project would provide significant benefits to the local economy through increased jobs, tax revenues, and royalty payments. Specifically, the TAGS FEIS indicated that construction of the TAGS facilities would create up to 7,200 new jobs during the peak year. Operations would employ about 550 people directly, and support over 1,000 more jobs indirectly. Royalty payments, state taxes, and property taxes are expected to produce about \$377 million in state government annual revenues. The benefits to Alaska are undisputed in the record.

⁶⁹ See EIA, *U.S. Crude Oil, Natural Gas, and Natural Gas Liquids Reserves, 1987 Annual Report*, DOE/EIA-0216(87); AOGCC, *Bulletin*, "Estimate of Gas Reserves in Alaska," May 1988, at 4; and ADNR, *Historical and Projected Oil and Gas Consumption*, January

1989, Table 2.1. (Copies of relevant pages attached as Exhibits A-C in Alaskan Northwest's Supplemental Comments Relating to January 24, 1989 Conference, submitted February 7, 1989.)

4. International Effects

The international effects of a proposed export may also be significant in the public interest determination. In general, the DOE believes that the public interest is served best through a policy of free trade in energy resources. Such a policy promotes energy interdependence among all nations, rather than energy dependence on a few nations. Competition in world energy markets promotes the efficient development and consumption of energy resources, as well as lower prices, whereas economic distortions can arise from artificial barriers to the free flow of energy resources. Accordingly, the DOE believes that the public interest in free trade generally supports approval of proposed exports.

This particular export project has beneficial international effects in addition to those normally associated with free trade. The export project would serve markets in the strategically important Pacific Rim countries of Japan, South Korea, and Taiwan.⁷⁰ By increasing the energy security of these allies, the project, in effect, would strengthen our national security. In addition, the U.S. currently is experiencing a trade imbalance with these Pacific Rim countries. By increasing exports to these

countries, the export project would tend to mitigate this trade imbalance.

Of course, the public interest in international energy markets also requires consideration of the North American energy market. Accordingly, the DOE has given special consideration to the concerns of Canada, our major partner in the North American energy market. The Canadian concerns about the proposed export center on the effects of the approval of the export project on the U.S. Government's commitment to ANGTS.⁷¹

The U.S. Government has complied fully with its commitment to ANGTS by removing all regulatory impediments to the completion and operation of ANGTS by private parties. Moreover, it has assured Canada that it will not erect new regulatory barriers to the completion of ANGTS by private parties. In particular, the President's *Finding* reaffirmed all existing commitments to support the special regulatory treatment of the "prebuild" segments of the ANGTS, including the minimum revenue stream guarantees.

DOE does not believe approval of the proposed TAGS export to be inconsistent with the U.S. Government's commitment

⁷⁰ The U.S. Government has long recognized the potential strategic value of exporting North Slope natural gas to Pacific Rim markets. In 1983, President Reagan recognized the potential importance of North Slope gas to U.S. relations with Pacific Rim countries when he and Japanese Prime Minister Nakasone agreed to encourage private efforts to explore the possible export of North Slope gas. See *Joint Statement of President Reagan and Prime Minister Nakasone on Energy Cooperation*, November 11, 1983. See also June 17, 1983, letter from Secretary of Commerce Malcolm Baldrige to Bill Sheffield, Governor of Alaska in which the Secretary stated "The Administration views the development of Alaska North Slope natural gas as a major contribution to Western energy security, whether the gas is marketed in the United States or abroad, it reduces demand for OPEC and Soviet energy and clearly results in significant benefits to the U.S. economy."

⁷¹ The U.S. Department of State also has considered the Canadian concerns and has found the proposed export would not breach any agreement between the U.S. and Canada. In response to Canadian concerns about the viability of ANGTS, the State Department stated:

The United States Government continues to support development of the ANGTS pipeline based on

private sector financing. Its eventual development is a private sector decision, and must be based on private financing, as stated in the original 1977 Bilateral Agreement and repeated on many occasions since. Decisions on private sector financing can and should reflect the economic potential of the project as determined by market considerations. By the same token, the United States Government will not impede the private sector from developing other initiatives to develop Alaska North Slope gas. Like ANGTS, their development is a private sector decision, explicitly requiring private sector financing, and thus reflecting their economic potential as determined by the market place. . . . Other projects for developing [Alaska North Slope] gas resources will have to rise or fall on their economic merits, as determined by the market. . . . Our policy is that ANGTS, TAGS, or any other project for [Alaska North Slope] gas must be strictly private capital ventures, competing equally in the market place for financing. Such an approach would be consistent with our goal of allowing the market to determine how the gas is developed.

See letter from Mr. J.P. Ferriter to Mr. L.H. Legault, attached as Exhibit T to *Reply Comments* of Yukon Pacific.

to ANGTS. Approval of the proposed export will create no regulatory impediments to the completion and operation of ANGTS.⁷² The commitments of the U.S. and Canada to ANGTS did not include any pledges to impose a governmentally-dictated scheme of development on energy resources. To the contrary, the bilateral agreements on ANGTS were important first steps in the recognition that the interests of both countries are best served by letting the marketplace decide the most efficient development of energy resources with minimal governmental interference. The DOE believes that continuation of the commitment to removal of governmental impediments and deference to marketplace decisions eventually will result in the efficient development of North Slope natural gas.

5. The Environment

Environmental concerns are an important element of DOE's public interest consideration. In general, DOE considers environmental issues in the context of the National Environmental Policy Act of 1969 (NEPA).⁷³ The DOE participated as a cooperating agency during the preparation of and has adopted the TAGS FEIS⁷⁴ which examined the environmental effects of constructing and operating the TAGS pipeline, liquefaction facility, marine terminal, and related project components.⁷⁵ The publication of the FEIS

was the culmination of a comprehensive process that began with Yukon Pacific's application for a right-of-way permit in 1984. During the scoping process the DOE participated in six public meetings in Alaska in 1986 designed to identify the environmental issues and concerns related to the project. Additionally, the DOE participated in eight formal public hearings on the draft EIS in 1987 and thoroughly reviewed the draft EIS prior to the issuance of the FEIS. The DOE has concluded that the TAGS FEIS is a complete document that complies with the NEPA process and provides an adequate basis to evaluate the environmental aspects of the section 3 public interest determination concerning the export project.

The DOE used that FEIS, as well as its independent review, in assessing the environmental consequences of granting the proposed export. The DOE's findings are discussed in its *Record of Decision* for the Yukon Pacific project which was issued in conjunction with this order and is being published in the *Federal Register*.⁷⁶ The DOE determined that the overall physical impacts anticipated to the natural environment are relatively minor and can be mitigated, and thus are environmentally acceptable, especially when balanced against the substantial economic benefits to be derived from the project.⁷⁷

⁷² In fact, the DOE is including in this authorization a specific condition to ensure that the export will not be inconsistent with the framework adopted at the inception of ANGTA. See Section V.C., *infra*.

⁷³ 42 U.S.C. 4321, *et seq.*

⁷⁴ *Trans-Alaska Gas System Final Environmental Impact Statement* (FEIS BLM-AK-PT-88-003-1792-910, June, 1988). DOE/EIS-0139.

⁷⁵ The ANGTS sponsors questioned the treatment in the FEIS of the gas conditioning facility (GCF) that would be used by the TAGS project. The FEIS did not consider a GCF in the Prudhoe Bay area as part of the TAGS project. Rather, the FEIS considered the GCF as a connected action to be evaluated with regard to environmental effects when the plant configuration and technology are more certain. The FEIS conceptually described the GCF that would be needed to produce pipeline quality natural gas for TAGS and analyzed and discussed the potential environmental consequences as they presently exist for the construction and operation of the conceptual GCF if it was located at Prudhoe Bay adjacent

to Atlantic Richfield Company's existing Central Gas Conditioning Facility.

As noted previously, the unconstructed ANGTS holds a conditional certificate from the FERC to build and operate the Alaska Gas Conditioning Facility (AGCF) at Prudhoe Bay to support the proposed ANGTS project. The FEIS is based on the assumption that the ANGTS facilities will be built. The FEIS indicated that no significant cumulative effects are expected from the construction and operation of the AGCF and a stand-alone conditioning facility for TAGS located several miles south of the area identified for the AGCF.

⁷⁶ The *Record of Decision* was issued under the Council on Environmental Quality Regulations implementing the procedural provisions of NEPA and the DOE's guidelines for compliance with NEPA (52 FR 47662, December 15, 1987).

⁷⁷ The DOE notes that the physical impacts associated with the development of North Slope gas may occur regardless of whatever action the DOE takes since the ANGTS sponsors already have legislative and regulatory approval to construct ANGTS. As part of the

The FEIS indicates that the proposed export project can be constructed and operated in an environmentally acceptable manner provided that the specific mitigation measures identified in the FEIS are implemented. These measures include compliance with the tiered review process⁷⁸ set forth in the FEIS and any resulting environmental requirements, including the stipulations already required by BLM in the TAGS right-of-way. This compliance would minimize any negative social, economic, and environmental effects and note the positive effects of the proposed TAGS project.

Following issuance of the FEIS, Exxon Shipping Company's crude oil tanker, the Exxon Valdez, went off course and ran aground in Prince William Sound on March 24, 1989, spilling 242,000 bbls of North Slope crude. The resulting damage to shoreline and wildlife has emphasized the need for strict preventive and mitigative measures to maintain transportation safety and protect the environment, as well as for comprehensive monitoring to ensure compliance with these measures. The DOE believes that energy projects can and must be undertaken consistent with environmentally acceptable practices. To ensure this result, the DOE is attaching a condition to the export approval that all aspects of the export project must be undertaken in accordance

(Footnote Continued)

approval process for ANGTS, the Council on Environmental Quality found the physical impacts of ANGTS (similar in nature to those predicted for TAGS) to be environmentally acceptable and this finding was ratified by the President and Congress. (See the President's Decision on ANGTS at 132-133).

⁷⁸ Yukon Pacific, BLM, and USACE are using a tiered approval system for the design and construction of the TAGS project. The fundamental approach used in the tiered mitigation process is: the development and approval of design criteria, final design, and the issuance of a "Notice to Proceed." Therefore, the discussion of mitigation measures in the FEIS tend to be generic and refer to site specific designs not yet done. Consistent with that tiered concept, BLM attached stipulations to its grant of a right-of-way for TAGS which specify that Yukon Pacific will submit for governmental approval certain plans and site specific designs before proceeding with field activities. These stipulations and subsequent plans will set forth the standards of performance for construction and operation of the pipeline, and termination of the right-of-way. The

with the appropriate environmental review process and must comply with any and all preventative and mitigative measures imposed by Federal or State agencies.

The DOE expects those agencies responsible for regulating the construction and operation of the proposed TAGS facilities to impose and strictly enforce all necessary measures to preserve and protect the natural environment and to incorporate within these measures the lessons that have been learned from the Exxon Valdez incident. In particular, the DOE is directing the FERC to consider the safety and environmental aspects of the export site and facilities, including the liquefaction plant, the marine terminal, the LNG tankers and their routes in Prince William Sound and U.S. territorial waters, prior to approving any export site or facilities.⁷⁹ This consideration should place particular emphasis on the need for the FERC to exercise the full extent of its section 3 authority to regulate the marine transportation of LNG if it approves an export site. Any FERC approval should include all appropriate preventive and mitigation measures to protect the public health, safety, and environment.

C. ANGTA

In addition to the public interest determination of section 3 of the NGA, the

stipulations cover (1) protection of the environment; (2) integrity of the pipeline system; (3) integrity and protection of adjacent or intersecting facilities, in particular, the TAPS and ANGTS pipelines; (4) public health and safety; and (5) effects on socioeconomic, subsistence, and cultural resources. Mitigation of environmental impacts and monitoring of the project by BLM will be primarily through monitoring, enforcement, and action under these stipulations.

⁷⁹ DOE Delegation Order 0204-112 delegated the FERC authority under section 3 of the NGA to approve or disapprove "the construction and operation of [export] facilities, the site at which such facilities shall be located, and the place of . . . exit for exports" of natural gas, as well as the authority to exercise the functions under sections 4, 5, and 7 of the NGA with respect to exports. See 49 FR 6690 (February 22, 1984). Any exercise of authority under this delegation order, however, must be consistent with the terms and conditions under which the DOE authorizes an export and with the DOE's policies.

DOE has considered the proposed export in light of the statutory framework of ANGTA as it relates to exports of North Slope natural gas. Section 12 of ANGTA prohibits the export of North Slope gas in the absence of a finding that the export will not affect American consumers adversely. Section 9 of ANGTA requires the DOE to assess whether a regulatory action would significantly impair the construction or initial operation of ANGTS.

The ANGTS sponsors argue that the proposed export is inconsistent with the framework of ANGTA because it would make completion and operation of ANGTS more expensive or impractical and thus cannot be approved. In particular, they assert that the proposed export would affect ANGTS adversely because (1) there are insufficient proven reserves of North Slope gas to support the proposed export and ANGTS, (2) the export project would increase the costs of ANGTS, and (3) in certain locations, the construction and operation of two natural gas pipelines would be impractical or impossible.

The DOE evaluated these concerns in light of the framework of ANGTA. As discussed in the July 25 procedural order, this evaluation focused on the direct effect that regulatory action might have on the ability of the ANGTS sponsors to proceed with its expeditious construction and operation. ANGTA was intended to remove regulatory roadblocks that could impede the prompt commencement and completion of the ANGTS. However, ANGTA neither contemplates the insulation of ANGTS from all competition nor requires the creation of regulatory obstacles to other North Slope gas projects.

The DOE does not think that ANGTA mandates the rejection of a proposed export because there may be insufficient proven reserves for both the proposed export and ANGTS. Neither does it require the imposition of a condition to set aside certain reserves for ANGTS.⁸⁰

⁸⁰ In this regard, DOE notes the statement of Senator Henry Jackson when the Senate approved ANGTA that "ANGTA is a procedural bill which, unless otherwise explicitly stated, does not modify existing rights and obligations of affected persons." 122 Cong. Record 22018, 22023 (July 1, 1976).

⁸¹ Mr. George McHenry, representing Foot-hills, stated at the public conference in

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Such actions would be inconsistent with the framework of ANGTA. ANGTA neither grants ANGTS an exclusive license to North Slope gas nor dedicates any particular reserves to ANGTS.⁸¹

ANGTA was enacted to establish a process for selecting a transportation system to bring natural gas from the North Slope of Alaska to the lower-48 states and to facilitate its construction and operation. Contrary to the assertions of the ANGTS sponsors, ANGTA was not intended to somehow mandate the use of North Slope gas in the domestic market or to limit its export to formal exchanges of energy supplies. In fact, section 12 of ANGTA explicitly addresses the export of North Slope gas and permits the export on the same basis as any other gas once the President finds, as has occurred, that the export will not be detrimental to American consumers. There is no hint in ANGTA or its legislative history that Congress intended *sub silentio* to link the export of North Slope gas to the effect on ANGTS. To the contrary, decisions concerning ANGTS were to be made by private parties on the basis of actual market conditions without any governmental subsidies.

Currently Yukon Pacific, the ANGTS sponsors, or any other private party is free to negotiate and sign contracts with the producers of North Slope gas. Regulatory approval of the proposed export will not change this situation. Rejecting the proposed export or imposing a condition on the proposed export to set aside certain North Slope gas for ANGTS would not be a measure to mitigate the effects of regulatory action, but rather the creation of a regulatory obstacle to competition for North Slope gas. Such action is not mandated by ANGTA and, in fact, would be inconsistent with the explicit language in ANGTA that permits exports of North Slope natural gas if the requirements of section 3 of NGA and section 12 of ANGTA are met.

Anchorage on January 25, 1989, that "we have never suggested that the ANGTS sponsors own the North Slope reserves or they were given by Congress to the sponsors of the ANGTS. What we have said is that producers own those reserves and obviously they have the right to enter into contracts with whomever they please." See Transcript, at 148.

Unlike the asserted concerns about reserves, the effects of TAGS on the costs and physical feasibility of constructing and operating ANGTS do come within the intended framework of ANGTA since they could directly impair its construction and operation. The ANGTS sponsors have presented sufficient evidence to demonstrate that the proximity of the TAGS pipeline to ANGTS in many locations creates the potential that ANGTS may become significantly more expensive, or even impossible to construct and operate because of the proposed export. There is no evidence, however, that this potentiality cannot be managed in a manner that permits TAGS to be constructed and operated without impairing the construction and operation of ANGTS.

The DOE does not believe that it is either feasible or necessary to resolve the management of every potential interaction between TAGS and ANGTS prior to the approval of the proposed export. Such an effort would be enormously time-consuming and inefficient since, while a large number of potential situations for adverse interaction between TAGS and ANGTS would be hypothesized, the number of actual situations most likely will be small. The DOE has decided that the export can be approved consistently with the framework of ANGTA, and in particular section 9, if it exercises its plenary authority under section 3 of the NGA to attach to the approval a condition that incorporates the requirements of section 9. In particular, this "ANGTA condition" will prohibit Yukon Pacific from taking any action that would compel a change in the basic nature and general route of ANGTS or otherwise prevent or impair in any significant respect its expeditious construction and initial operation.⁸²

⁸² The DOE has not included a similar condition with respect to TAPS because the oil pipeline already is constructed and there is no statutory provision for TAPS comparable to ANGTA. Moreover, the TAPS right-of-way, like the ANGTS right-of-way, prohibits any incompatible uses by holders of subsequent rights-of-way on or adjacent to the right-of-way. In addition, the TAGS right-of-way makes the proposed export project subject to the pre-existing rights-of-way for TAPS and ANGTS. Enforcement of these provisions will prevent actions by Yukon Pacific that are incompatible with TAPS.

⁸³ ANGTA established the Office of Federal Inspector (OFI) to coordinate and monitor

Since the DOE is exercising its plenary authority under section 3, the "ANGTA condition" extends to the pipeline and related facilities, such as a gas conditioning plant or any support facility or resource. It does not extend to natural gas reserves. As discussed previously, the ANGTA framework draws a clear distinction between the construction and operation of ANGTS and market decisions concerning the development of North Slope natural gas.

The DOE does not intend the "ANGTA condition" to be used as a means to delay or otherwise burden the proposed export project unnecessarily. The ANGTS sponsors must demonstrate the adverse effect on ANGTS of an action by Yukon Pacific. This demonstration may not be speculative, but rather should be based on facts which clearly show that an action directly will increase the cost of constructing or operating ANGTS or will make constructing or operating ANGTS impractical. Where the ANGTS sponsors demonstrate increased costs, Yukon Pacific will be presumed to satisfy the "ANGTA condition" if it agrees to compensate the ANGTS sponsors by paying the larger of the increased costs or its proportionate share of the overall costs of the measures necessary to mitigate the effects of TAGS on ANGTS. Where the ANGTS sponsors demonstrate that TAGS will make constructing or operating ANGTS impracticable, Yukon Pacific will be presumed to satisfy the "ANGTA condition" if it agrees to modify its project to avoid the problem or, where appropriate, to construct joint facilities which accommodate the needs of ANGTS.⁸³

Federal activity concerning ANGTS. Reorganization Plan No. 1 of 1979 (Reorganization Plan) (44 FR 33663, June 12, 1979) transferred to OFI exclusive responsibility for enforcing all Federal statutes, regulations, and authorizations relevant in any manner to the preconstruction, construction, and initial operation of ANGTS. In areas where TAGS and ANGTS would interact, OFI would have responsibility to determine the compatibility of TAGS with ANGTS, to review and approve designs, plans, and schedules, and to enforce the provisions and requirements of Federal authorizations such as the TAGS right-of-way when it is on or adjacent to the ANGTS right-of-way.

D. Other Matters

Section 3 of the NGA provides plenary authority over all aspects of an export where the public interest requires the exercise of such authority.⁸⁴ In general, the DOE refrains from exercising the full extent of its section 3 authority unless it determines action is necessary to avoid a regulatory gap inconsistent with the public interest or to preserve the integrity of the export approval and the underlying public interest determination.

The DOE has examined all aspects of the export project to determine the extent to which it should exercise its plenary authority in this proceeding. Since the proposed export project will be subject to comprehensive regulatory oversight by the State of Alaska, BLM, USACE, FERC, and other Federal agencies, DOE has determined that the need to exercise its plenary authority is limited.⁸⁵ DOE has determined, however, that there are certain situations where the exercise of this authority is appropriate.⁸⁶

The gas conditioning facilities have been the subject of much controversy in this proceeding. Yukon Pacific asserts that the conditioning plant is not part of its project and should not be considered in this proceeding. The ANGTS sponsors argue that the conditioning plant should be considered because of its potential effects on the environment and because of the issues that would arise if TAGS and ANGTS share a conditioning plant. Since the DOE's regulatory authority over exports extends to the wellhead, the conditioning plant comes within its purview.

(Footnote Continued)

Since the "ANGTA condition" in this authorization is directly relevant to ANGTS, OFI will be responsible for its enforcement. Pursuant to Section 2-202(c) of the Reorganization Plan, OFI is required to follow the policies of the agency that otherwise would be responsible for the enforcement function and the DOE reserves the right to announce specific policy measures to enforce this condition. The DOE emphasizes that its general policy is that this condition shall not be enforced in a manner that unduly delays or hinders any aspect of Yukon Pacific's export project and that expeditious procedures should be followed to resolve any disputes concerning this condition.

⁸⁴ In *Distrigas Corporation v. FPC*, 495 F.2d 1057 (D.C. Cir. 1974), cert. denied, 419 U.S. 834 (1974), the court found that section 3 of

The DOE believes that any environmental concerns can be mitigated in an acceptable manner whether TAGS and ANGTS share a gas conditioning plant or they construct separate facilities. DOE expects the tiered process contemplated in the FEIS will take place for all aspects of the TAGS project, including the conditioning plant and production facilities that will be used to supply the gas to be exported. As discussed in section V.B.5 *supra*, the DOE is attaching a condition to the export approval that all aspects of the export project, regardless of whether they are undertaken by Yukon Pacific, must be undertaken in accordance with the appropriate environmental review process, and must comply with any and all environmental preventive and mitigative measures imposed by federal or state agencies.

The potential for sharing a gas conditioning plant also raises another issue for which action by DOE is appropriate. In general, the cost and practicality aspects of sharing such a facility are covered by the "ANGTA condition." However, the question of the jurisdiction of the FERC makes additional action appropriate. The DOE Organization Act gives the Secretary of Energy all NGA authority over natural gas imports and exports. The FERC cannot exercise any authority over imports or exports unless the Secretary assigns such a function to the FERC. While the Secretary has delegated to the FERC some authority over the siting, construction, and operation of import and export facilities and over imports and exports once they are in interstate com-

the NGA provides the authority for "comprehensive regulation" where such power is "responsibly exercised" to protect the public interest. "Section 3 supplies . . . not only . . . the power necessary to prevent gaps in regulation, but also . . . flexibility in exercising that power." 495 F.2d at 1064. The court also made clear that power under section 3 extends equally to imports and exports. 495 F.2d at 1063; see also, *Border Pipe Line Company v. FPC*, 171 F.2d 149 (1948).

⁸⁵ See Appendix S to *Initial Comments* of Yukon Pacific at 36-55 for a description of the regulatory oversight by various federal and state agencies to which TAGS will be subject.

⁸⁶ As discussed previously, the "ANGTA condition" will extend to all aspects of the export project.

merce,⁸⁷ the exercise of that authority is subject to any terms or conditions attached by the DOE to the import or export approval.⁸⁸ In order to avoid overlap with enforcement of the "ANGTA condition" and to relieve the export from duplicative and unnecessary regulation, the DOE has decided to exercise its authority to limit any jurisdiction the FERC might otherwise acquire over the export project in the event TAGS and ANGTS share a facility that is subject to the FERC's interstate commerce jurisdiction, such as the Alaska Gas Conditioning Facility proposed by the ANGTS sponsors. The FERC shall only exercise such authority over the export project to the extent necessary to ensure that the shared facility is constructed and operated in accordance with FERC's regulations, including those concerning the environment. The FERC shall have no other authority over Yukon Pacific's export project, including its rates, except to the extent necessary to ensure that Yukon Pacific pays its part of the costs of any shared facility. The DOE intends this limitation on the FERC's authority to apply not only to the gas conditioning plant, but also to any other facility subject to the FERC's jurisdiction that the export project might utilize. This limitation does not apply to the FERC's section 3 authority over the liquefaction plant, marine terminal, and transportation of the LNG.

With respect to the liquefaction plant and marine terminal, the Secretary delegated to the FERC section 3 authority over the siting and construction of new import/export facilities. This delegation stipulates that the FERC cannot approve any site that the DOE disapproves. On the basis of its environmental review, the DOE has concluded that the Valdez export site is preferable to all other export sites that were considered in the FEIS, including the Cook Inlet site. Three factors discussed in the FEIS indicate that Port Valdez is environmentally preferable to the Cook Inlet alternative. First, the Cook Inlet alternative creates new disturbances in Minto Flats, an important sub-

sistence use area. By contrast, the impacts of the proposed project are in an existing transportation and utility corridor. Second, the Cook Inlet alternative crosses Denali National Park and Preserve, and would impact visitors traveling to and from the park. While the proposed project would impact visitors and travelers elsewhere, Denali has the greater concentration. Finally, the Cook Inlet alternative includes a 15-mile subsea crossing, an impact to an ecosystem that does not occur under the proposed project. Accordingly, the DOE disapproves all sites other than the Valdez site. This action should not be interpreted as approval of the Valdez site. As discussed previously in Section V.B.5. *supra*, the DOE is requiring as Departmental policy that the FERC conduct its own examination of the health, safety, and environmental impacts associated with Yukon Pacific's use of the Valdez site for its proposed export project, including the liquefaction plant, the marine terminal, the LNG tankers, and the LNG tanker routes, and that it impose all appropriate conditions to mitigate the environmental effects resulting from the construction and operation of those facilities.

VI. Conclusion

After taking into consideration all the information in the record of this proceeding, I find that granting Yukon Pacific authority to export up to 14 million metric tons annually of liquefied North Slope natural gas for sale to the Pacific Rim countries of Japan, South Korea, and Taiwan during a term of 25 years has not been shown to be inconsistent with the public interest.

ORDER

For the reasons set forth above, pursuant to section 3 of the Natural Gas Act, it is ordered that:

A. Yukon Pacific Corporation (Yukon Pacific) is authorized to export for sale to Japan, South Korea, and Taiwan a total of up to 14 million metric tons of liquefied natural gas (LNG) annually from the North Slope of Alaska over a 25-year

⁸⁷ See DOE Delegation Order No. 0204-112, *supra* note 79.

⁸⁸ In *TransCanada Pipelines v. FERC*, No. 87-1229, June 16, 1989, the D.C. Circuit Court of Appeals found "Congress specifically pre-

cluded FERC from exercising its general ratemaking authority over imported [and exported] gas except to the extent that the Secretary expressly delegates the task to FERC." *Slip op.*, at 11; see also *id.*, at 7-9.

period beginning on the date of the first delivery, upon the conditions herein set forth.

B. For purposes of this Order, the "export project" means the Trans-Alaska Gas System (TAGS) and all appurtenant facilities, including production facilities, gas conditioning facilities, liquefaction plant, marine terminal, and LNG tankers.

C. With respect to the place of exportation for the LNG authorized in Ordering Paragraph A above, all locations other than Port Valdez, Alaska, are hereby rejected.

D. No cost of the export project shall be recovered from U.S. consumers of natural gas except to the extent that the cost relates to facilities and natural gas used and useful for supplying North Slope natural gas to the U.S. consumers.

E. No action shall be taken in connection with the export project that would compel a change in the basic nature and general route of the Alaska Natural Gas Transportation System (ANGTS) or otherwise prevent or impair in any significant respect the expeditious construction and initial operation of ANGTS.

F. All aspects of the export project shall be implemented in accordance with all applicable environmental procedures and requirements and shall comply with all preventive and mitigative measures imposed by Federal and State agencies to protect the public health, safety and environment.

G. All contracts and other documents that underlie the acquisition, transportation, and sale of North Slope gas authorized herein shall be filed with the DOE within 30 days of their execution.

H. Within 48 hours after deliveries begin, Yukon Pacific shall notify the

Office of Fuels Programs, Fossil Energy, Room 3F-056, FE-50, 1000 Independence Avenue, S.W., Washington, D.C. 20585, in writing of the date that the first export of LNG authorized in Ordering Paragraph A above occurs.

I. With respect to the exports authorized by this Order, Yukon Pacific shall file reports with the Office of Fuels Programs (1) after the first full calendar month of service, and (2) within thirty days following each calendar quarter, indicating, whether sales of exported natural gas have been made, and if so, giving by month, the total volume of exports in Mcf and the average price for exports per MMBtu delivered to each respective purchaser. The reports shall also provide the details of each export transaction, including the name(s) of the purchaser(s), LNG tankers utilized, volumes sold to each purchaser, and identification of markets served.

J. Except for the authority under DOE Delegation Order No. 0204-112 over the export site, including the liquefaction plant, marine terminal, and related transportation of LNG, the Federal Energy Regulatory Commission (FERC) shall exercise no authority over the export project except to the extent necessary to ensure that (1) any facility used for the provision of natural gas from Alaska to another state and thereby subject to the FERC's interstate commerce jurisdiction is constructed and operated in accordance with the FERC's regulations, including those concerning the environment, and (2) the export project pays its share of the costs of any such facility.

Issued in Washington, D.C., on November 16, 1989.

¶ 70,260

Niagara Mohawk Power Corporation (FE Docket No. 89-33-NG),
November 15, 1989.

DOE/FE Opinion and Order No. 351

Conditional Order Granting a Long-Term Authorization to Import
Natural Gas From Canada and Granting Interventions

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¶ 70,260

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allowing commercial parties to freely negotiate their own trade arrangements.

Carson's uncontested export proposal, as set forth in the application, is consistent with section 3 of the NGA and the DOE's international gas trade policy. We believe that the current domestic natural gas supply, coupled with the short-term, market-responsive nature of the contracts into which Carson proposes to enter, indicate that it is unlikely the proposed export volumes will be needed during the term of the authorization. Further, as Carson notes, the export will provide increased tax and related revenues to the individual producer sellers, and benefit gas transporters by increasing pipeline throughput. Finally, Carson's proposal will further the Secretary's policy goals of reducing trade barriers by encouraging market forces to achieve a more competitive distribution of goods between the U.S. and Mexico, and thereby enhances cross-border competition in the marketplace.

After taking into consideration all the information in the record of this proceeding,

I find that granting Carson blanket authority to export up to 4,000,000 Mcf of natural gas from the U.S. to Mexico during a period of two years, under contracts with terms of two years or less, is not inconsistent with the public interest.

ORDER

For the reasons set forth above, pursuant to section 3 of the Natural Gas Act, it is ordered that:

A. Carson Water Company (Carson) is authorized to export up to 4,000,000 Mcf of natural gas from the United States to Mexico during a two-year period beginning on the date of the first delivery.

B. Within two weeks after deliveries begin, Carson shall notify the Office of Fuels Programs, Fossil Energy, Department recognition that it might be aggrieved because of any order issued in these proceedings.

Issued in Washington, D.C. on February 7, 1990.

¶ 70,303

Yukon Pacific Corporation (ERA Docket No. 87-68-LNG), March 8, 1990.

DOE/FE Opinion and Order No. 350-A

Order Denying Requests for Rehearing and Modifying Prior Order for Purpose of Clarification

I. Background

On November 16, 1989, the Office of Fossil Energy (FE) of the Department of Energy (DOE) issued DOE/FE Opinion and Order No. 350 (Order 350).¹ Order 350 granted Yukon Pacific Corporation (Yukon Pacific) authorization under section 3 of the Natural Gas Act (NGA) to export natural gas produced in the North Slope region of Alaska to the Pacific Rim countries of Japan, South Korea, and Taiwan. Yukon Pacific plans to build the Trans-Alaska Gas System (TAGS) to deliver gas from Prudhoe Bay to Port Valdez on Alaska's southern coast, where it would be converted to liquefied natural gas (LNG) and shipped by tanker to

Pacific Rim customers. On December 15, 1989, Alaskan Northwest Natural Gas Transportation Company (Alaskan Northwest) and Foothills Pipe Lines (Yukon) Ltd. (Foothills), sponsors of a competing private commercial project, the Alaska Natural Gas Transportation System (ANGTS),² filed individual applications for rehearing of Order 350. On the same date, Yukon Pacific filed a request for clarification.

II. Requests for Rehearing

Alaskan Northwest and Foothills specified numerous alleged errors in the DOE's decision. A list of these alleged errors is contained in the appendix of this order.

¹ 1 FE ¶ 70,259.

² ANGTS is a project to deliver North Slope natural gas to markets in the lower-48 states

by means of a pipeline across Alaska and Canada.

Their applications restate arguments the ANGTS sponsors urged previously in this proceeding and do not provide any new relevant and material information. Their principal arguments may be summarized as follows: (A) Order 350 is inconsistent with the Alaska Natural Gas Transportation Act (ANGTA),³ the 1977 bilateral agreement between the U.S. and Canada relating to the ANGTS,⁴ and the measures taken to implement these documents (hereafter collectively referred to as the ANGTA framework); (B) Order 350 improperly permits Yukon Pacific to compete for North Slope natural gas reserves that "belong" to the ANGTS project; (C) Order 350 represents a taking of property and violation of substantive due process with respect to Alaskan Northwest's and Foothills' "franchise" to bring North Slope gas to the lower-48 states; (D) the export of North Slope gas is not consistent with the public interest; (E) the DOE did not comply with statutory, regulatory, and procedural due process requirements in issuing Order 350; and (F) Order 350 improperly restricts the regulatory authority of the Federal Energy Regulatory Commission (FERC) and the Office of Federal Inspector (OFI) for the ANGTS.

The DOE has considered carefully all of the arguments made by Alaskan Northwest and Foothills and is not persuaded to change Order 350. Their applications for rehearing fail to overcome either the general presumption favoring export authorizations mandated by section 3 of the NGA or the substantial evidence in the record of this proceeding that exports of North Slope gas would be consistent with the public interest. Therefore, the applications for rehearing are

denied in their entirety. In the following paragraphs, the DOE sets forth its views on the principal arguments of Alaskan Northwest and Foothills.

A. Order 350 is Consistent with the ANGTA Framework and Provides Explicit Protection for ANGTS.

Many of Alaskan Northwest's and Foothills' arguments flow from the contention that the ANGTA framework requires that any project competing with ANGTS be rejected or at least severely restricted.⁵ Prior to the issuance of Order 350, the DOE considered these arguments and found them unpersuasive. The ANGTA framework cleared the administrative path for the construction and operation of ANGTS. It did not guarantee financing for ANGTS or block competition for the development of North Slope natural gas.⁶

The U.S. Government has taken all actions necessary to implement the ANGTA framework. Nothing in Order 350 affects these actions. All the special statutory and regulatory treatment for ANGTS remains intact, ready to be used whenever the sponsors decide, after years in abeyance, to resume its construction.

With respect to the assurances to Canada concerning ANGTS, the DOE again rejects the assertions by Alaskan Northwest and Foothills that authorizing exports of North Slope gas is inconsistent with this aspect of the ANGTA framework. Order 350 stated:

The U.S. Government has complied fully with its commitment to ANGTS by removing all regulatory impediments to the completion and operation of ANGTS by private parties [and] . . .

Protective Complaint Under the Alaska Natural Gas Transportation Act Challenging Order of the Department of Energy Office of Fossil Energy filed by Foothills with the U.S. Court of Appeals for the District of Columbia on January 12, 1990. They cannot have it both ways. Since it is clear claims under ANGTA must be litigated under section 10, Alaskan Northwest and Foothills would be in an untenable position if they urged jurisdiction under section 19 of the NGA and also alleged that DOE violated ANGTA.

⁶ See Order 350, at pages 38-41, for a full description of the ANGTA framework; see also DOE's procedural order issued in this docket on July 25, 1988, at 19-22.

³ 15 U.S.C. 719 *et seq.*

⁴ *Agreement Between the United States of America and Canada on Principles Applicable to a Northern Natural Gas Pipeline*, September 20, 1977, U.S.T. 3581, T.I.A.S. 9030.

⁵ See Alaskan Northwest's stated errors (1)(a), (1)(b), (1)(c), (2), and (6) listed in the appendix of this order; see also Foothills' stated errors (1), (2), (3), and (5)(c). The DOE notes that while Alaskan Northwest and Foothills argue the ANGTA framework somehow imposes additional or different legal requirements on the DOE when it considers the export of North Slope gas, they also take the position "that judicial review of [Order 350] must occur under Section 19 of the Natural Gas Act . . . rather than under section 10 of ANGTA." See

has assured Canada that it will not erect new regulatory barriers to the completion of ANGTS by private parties.⁷

Order 350 does not conflict with the continuation of this commitment in any way. Mr. Richard T. McCormack, Undersecretary of State for Economic Affairs responded to Canada's concerns about Order 350 in a letter to Mr. Derek H. Burney, the Canadian Ambassador to the U.S.⁸ He said:

The United States Government has fulfilled, and continues to fulfill, its commitments to ANGTS... [W]e believe it would be inconsistent with market principles if we were to impose regulatory restrictions on private sector projects while advocating a private sector solution for ANGTS. Put another way, if we refused to grant the approvals [to TAGS] we would, in effect, be putting ourselves in the position of allocating gas among projects which, apart from its inconsistency with the principle of market-determined resource allocation, ignores the fact that this gas is owned by private firms and not the U.S. Government.

⁷ See Order 350, at 33-34.

⁸ Mr. McCormack forwarded this letter of January 29, 1990, to the DOE (and a letter from Ambassador Burney to him dated December 20, 1989) for inclusion in the record of this case. We have done so. In addition, W. Henson Moore, the Deputy Secretary of Energy, received a letter dated December 28, 1989, from Ambassador Burney expressing Canada's concerns about Order 350 and, in particular, its effect on the commercial viability of ANGTS. Ambassador Burney enclosed a copy of his letter to Mr. McCormack. The DOE placed in the record the Ambassador's letter to Mr. Moore and the Deputy Secretary's reply dated January 30, 1990.

On January 5, 1990, Alaskan Northwest and Foothills filed a joint motion for the DOE to lodge in the record the December 20, 1989, letter from Ambassador Burney to Mr. McCormack. This motion is moot because the letter already has been placed in the record.

⁹ Order 350 defined the export project to include the pipeline and all appurtenant facilities, including production facilities, gas conditioning facilities, liquefaction plant, marine terminal, and LNG tankers.

¹⁰ Although the "ANGTA condition" repeats the language of section 9 of ANGTA, it is neither duplicative of nor mandated by the ANGTA framework since section 9 only applies to authorizations for the construction and ini-

Moreover, Order 350 invokes the Department's plenary authority under section 3 of the NGA to include the "ANGTA condition." This condition prohibits explicitly any action in connection with the export project⁹ "that would compel a change in the basic nature and general route of [ANGTS] or otherwise prevent or impair in any significant respect the expeditious construction and initial operation of ANGTS."¹⁰ The DOE adopted this condition because it determined the public interest would be served by protecting the physical integrity of ANGTS. Even though the policy considerations that led the DOE to adopt this condition overlap, to some extent, those which support the ANGTA framework, neither the condition nor any other action under Order 350 was taken because of, or in violation of, some requirement or limitation in ANGTA.¹¹ Adoption of the "ANGTA condition" resulted from the same process by which the DOE ordinarily considers the policies that underlie various statutory frameworks, such as the antitrust laws, to the extent they are relevant to the public interest in a particular import or export application, even though

tial operation of ANGTS. Section 9 is a statutory privilege granted the ANGTS sponsors to prevent government agencies from granting or modifying authorizations for the ANGTS in a manner that would hinder its expeditious construction and operation. Section 9 does not apply to authorizations for projects other than ANGTS.

¹¹ The applications for rehearing filed by Alaskan Northwest and Foothills continue their efforts to modify this NGA section 3 proceeding by reading in requirements from ANGTA. ANGTA, however, did not change the existing process or requirements under section 3 of the NGA for authorization to export natural gas. It only added the requirement for North Slope gas that the President must find its export "will not diminish the total quantity or quality nor increase the total price of energy available to the United States." The decision whether to authorize exports of North Slope gas under section 3 is made independently of the *Presidential Finding Concerning Alaskan Natural Gas* issued on January 12, 1988 (53 FR 999, January 15, 1988). Even though Order 350 considered many of the same factors as did the *Presidential Finding*, its analysis and determinations were made in accordance with the public interest standard of section 3 and must be viewed in terms of compliance with that standard.

the statutes impose no obligation on the DOE either to act or not act.

In sum, the U.S. has removed all regulatory impediments to the private construction and operation of ANGTS. Order 350 in no way conflicts with any U.S. Government commitment to Canada regarding ANGTS. Order 350 does not create any new regulatory impediments to ANGTS and, in fact, takes into account the relevant policy considerations of the ANGTA framework through the exercise of the DOE's authority under section 3 of the NGA.

B. Order 350 Does Not Affect the Status of North Slope Natural Gas.

Intertwined with the arguments that Order 350 is inconsistent with the ANGTA framework are arguments that North Slope natural gas somehow "belongs" to the ANGTS project.¹² The DOE, however, still can find no basis for the various assertions by Alaskan Northwest and Foothills that imply: (1) North Slope natural gas is "committed" to ANGTS; (2) Prudhoe Bay reserves must remain in the ground, forever, if need be, until the ANGTS sponsors are ready to secure financing for the ANGTS; (3) the sponsors of ANGTS have an open-ended right of first refusal of North Slope natural gas; or (4) Congress intended North Slope natural gas exclusively for the domestic market and prohibited its export.

There is no provision in ANGTA or elsewhere to support these assertions.¹³ In fact, Alaskan Northwest and Foothills have cited no express guarantees or commitments with regard to North Slope reserves but rather have pleaded that a special status should be envisioned. The DOE can find no basis whatsoever for this "vision" of Alaskan Northwest and Foothills. Neither can the DOE see any special status that could be reconciled with the acknowledged fact that "producers own [North Slope] reserves and obviously

they have the right to enter into contracts with whomever they please."¹⁴ Moreover, Alaskan Northwest and Foothills have failed to persuade the DOE that the public interest requires a change in the current unencumbered status of North Slope gas by, in effect, imposing an easement on these reserves in favor of ANGTS.¹⁵

In any event, the DOE reiterates that Order 350 does not affect any rights of Alaskan Northwest and Foothills to North Slope natural gas. Prior to the issuance of Order 350, Alaskan Northwest and Foothills were free to contract with the North Slope producers for their gas reserves. Following its issuance, they continue to be free to make such contracts. Order 350 does not (1) restrict the rights of Alaskan Northwest and Foothills to contract for North Slope gas, (2) commit any amount of this gas to Yukon Pacific, or (3) grant Yukon Pacific any right to contract for this gas that it did not have prior to issuance.

C. Order 350 Does Not Represent Either a Taking or a Violation of Substantive Due Process with Respect to ANGTS.

Closely related to the arguments that Order 350 is inconsistent with the framework of ANGTA and that North Slope natural gas belongs to the ANGTS project is the contention that Order 350 constitutes a taking of property and a violation of substantive due process.¹⁶ Alaskan Northwest and Foothills argue that Order 350 was adopted arbitrarily and without proper consideration of their exclusive and perpetual franchise to develop North Slope gas and to deliver this gas to the lower-48 states and thus deprived them of their property rights and legitimate expectations under ANGTA. ANGTA, however, did not grant the sponsors of ANGTS an exclusive and perpetual franchise or any other shield against competition. Accordingly the authorization of a competing project cannot be equated

limits the proposed exports to volumes of Alaskan gas that are demonstrated to be in excess of the proven reserves required to finance and complete the ANGTS. . . ." See Foothills' application for rehearing at 2; see also Alaskan Northwest's application for rehearing, at 6.

¹² See Alaskan Northwest's stated errors (1)(c) and (2) in the appendix of this order; see also Foothills' stated errors (1), (2), (3), and (5)(c).

¹³ See Order 350, at pages 38-39, for a discussion of the status of North Slope gas.

¹⁴ *Id.*, note 81, at 39.

¹⁵ For example, Foothills contends that if Order 350 is not rescinded, the DOE should attach a condition to the authorization "which

¹⁶ See Alaskan Northwest's stated errors (1)(c), (6), and (7) in the appendix of this order; see also Foothills' stated errors (8) and (11).

with either a taking or a violation of substantive due process.¹⁷

ANGTA was primarily a procedural statute intended to minimize regulatory impediments to bringing North Slope gas to the lower-48 states by the early 1980s. To this end, in lieu of the protracted selection process at the Federal Power Commission, ANGTA substituted a mechanism by which the President, with Congressional approval, could designate the sponsors and the route for a transportation system to bring North Slope natural gas to the lower-48 states. ANGTA also eliminated or minimized certain statutory or regulatory requirements that the persons selected to build and operate the system would otherwise encounter before commencing construction. ANGTA did not provide the sponsors of the approved system with a monopoly franchise that prohibits development of North Slope natural gas until they decide the time is right to get their project underway. Nor did it bar competing developers of North Slope gas from securing the necessary governmental authorizations through the standard permit process without the advantages granted the sponsors of ANGTS.

In sum, ANGTA was intended to expedite development of North Slope natural gas, not to lock up this vast energy resource. ANGTA cleared the administrative path for obtaining the necessary federal permits and authorizations; it did not interdict marketplace competition over North Slope gas. Alaskan Northwest and Foothills have no property right or legitimate expectation on which to challenge Order 350 merely because it authorizes a competing project. The DOE crafted Order 350 so that it does not interfere with any of the statutory privileges granted Alaskan Northwest and Foothills by ANGTA. If these privileges have been diminished in value over time, it is not the result of any action or inaction by the U.S. Government.

D. Order 350 Is Based on Evidence in the Record That the Export Project Is Not Inconsistent with the Public Interest, Including, the Environmental and Domestic Need Aspects of the Public Interest.

In addition to their arguments concerning the effects of Order 350 on ANGTS, Alaskan Northwest and Foothills contend that Order 350 is not consistent with the public interest and, in particular, that it misjudges the effects of the export project on the environment and the domestic need aspects of the public interests.¹⁸ They have failed to provide, however, any additional evidence that undermines either the substantial evidence in the record or the statutory presumption that supports the public interest finding in Order 350.¹⁹

As part of its public interest determination, the DOE weighed the effects of the export project on the environment. Order 350 took into account the Final Environmental Impact Statement (FEIS)²⁰ on the export project and other environmental considerations such as the implications of the accident involving the oil tanker Exxon Valdez that occurred off Alaska after the FEIS was issued. Order 350 found that the environmental effects of the export project "are relatively minor and can be mitigated, and thus are environmentally acceptable, especially when balanced against the substantial economic benefits to be derived from the project." Order 350 requires the export project to "be implemented in accordance with all applicable environmental procedures and requirements" and to "comply with all preventive and mitigative measures imposed by Federal and State agencies to protect the public health, safety and environment." In conjunction with the issuance of Order 350, the DOE issued a *Record of Decision* pursuant to the regulations of the Council on Environmental Quality (40 CFR 1505.2) and the DOE's guidelines for compliance with the National Environmental Policy Act of

¹⁷ See Order 350, at 39.

¹⁸ See Alaskan Northwest's stated errors (3)(a), (3)(b), (3)(c), (3)(d), and (5) in the appendix of this order; see also Foothills' stated errors (5)(a), (5)(b), (5)(c), (5)(d), (5)(e), (5)(f), (5)(g), and (6).

¹⁹ See Order 350 for a discussion of DOE's findings concerning the public interest, at

pages 18-30 (domestic need), 31 (American consumers), 31-32 (efficient energy production), 32 (State of Alaska), 33-35 (international effects), and 35-38 (environment).

²⁰ *Trans-Alaska Gas System Final Environmental Impact Statement* (FEIS BLM-AK-PT-88-003-1792-910, June 1988) DOE/EIS-0139.

1969 (NEPA) which documents the manner in which DOE considered the environmental issues in its decision-making process.²¹

The DOE's public interest determination focused on domestic need for North Slope gas. In assessing domestic need, Order 350 did not conclude North Slope natural gas could not or would not be used in the domestic market. Rather, it found there exist large reserves of natural gas in North America within or below the reasonably anticipated cost range of North Slope natural gas that are more than sufficient to meet anticipated domestic need without any significant market distortions, even if North Slope natural gas does not flow to the lower-48 states during the term of the proposed exports. Thus, North Slope natural gas is not needed to meet anticipated domestic demand.

The crux of Alaskan Northwest's and Foothills' domestic need argument is the reliability of resource base estimates for projecting long-term domestic supply. Foothills state that the authorization was "based on a reckless wager that so-called 'potential' reserves will eventually be forthcoming and, if not, the deficiency can always be made up by foreign imports."²² As demonstrated in Order 350, any projection of long-term supply must incorporate the addition of reserves in the future.²³ Not recognizing this potential would be to ignore decades of historical record in which reserve addi-

tions have occurred year after year. There is nothing to suggest that this process will suddenly terminate in the near future. In addition, any decision based on the current stock of reserves alone would be distorted, if not outright absurd, since it necessarily would have to assume the U.S. will run out of natural gas before the end of the century.

The DOE believes that the gas resource base estimates for the U.S. published by the Potential Gas Committee,²⁴ the U.S. Geological Survey, and DOE/Argonne National Laboratories (DOE/Argonne) that were considered in the decision to grant the export application are credible.²⁵ They reflect the consensus in the energy community that additional gas resources beyond proved reserves can be discovered and produced with foreseeable technology and economic conditions.

Alaskan Northwest maintains that North Slope gas is needed domestically because supplies in the lower-48 states costing less than \$3.00 per Mcf wellhead price in 1987 dollars plus potential Canadian pipeline gas and LNG imports are insufficient to meet the DOE's postulated demand of 725 quads through 2021.²⁶ Alaskan Northwest implies that DOE should not consider as an additional source of gas supply the 174 Tcf in the lower-48 states which the DOE/Argonne estimate indicates would be recoverable in a wellhead price range of \$3.00 to

²¹ 54 FR 49337 (November 30, 1989). Alaskan Northwest and Foothills argue that the DOE did not comply with NEPA in issuing Order 350. A section 3 rehearing, however, is not the proper forum to consider compliance with the NEPA process. A section 3 rehearing reviews DOE's public interest determination, including the extent to which the determination took into account the environmental aspects of the public interest. In Order 350, consideration of the environmental aspects of the public interest resulted in the inclusion of several environmental conditions. A section 3 rehearing does not review procedural compliance with NEPA. The DOE's compliance with the NEPA process is set forth in the *Record of Decision* which represents final agency action on NEPA procedural matters. There is no provision for an administrative review (such as a section 3 rehearing) of a record of decision. See 40 CFR Parts 1500-1508.

²² See Foothills' application for rehearing, at 11.

²³ See Order 350, at pages 22-24, for a full discussion of reserves.

²⁴ The Potential Gas Committee is made up of a group of volunteer industry and governmental experts in the area of natural gas supply.

²⁵ The DOE notes that the resource amounts of all three appraisals are significantly less than a more recent report in late 1989 (on which Order 350 did not rely) from the American Association of Petroleum Geologists (AAPG). The AAPG report, "New Approaches to Gas Resource Evaluation," indicates the gas resource base in the lower-48 states is 869 Tcf at \$3.00/Mcf or less and 1,399 Tcf assuming \$5.00/Mcf. By comparison, the 1988 DOE/Argonne study estimated that 757 Tcf is recoverable at \$5.00/Mcf or less, of which 583 Tcf is recoverable under \$3.00/Mcf. See AAPG *Explorer*, September 1989, at 9.

²⁶ See appendix attached to Alaskan Northwest's application for rehearing, at 24.

\$5.00 per Mcf (1987 dollars).²⁷ In effect, Alaskan Northwest asserts that North Slope gas must be considered "needed" because of its prediction that the ANGTS can deliver gas to the U.S./Canada border at a price of \$3.00 per Mcf (1987 dollars), the sum of the wellhead price at which producers will produce and sell their gas (\$0.54)²⁸ and the cost of service estimate for pipeline transportation (\$2.46) to the border.²⁹ This argument is flawed in two significant aspects.

First, this argument reduces the need analysis to predictions about the future prices of various gas supplies. The DOE does not believe need can be determined simply by comparing predicted prices, even if gas prices could be predicted precisely ten to 20 years into the future. The need analysis is primarily an assessment of whether sufficient supplies can reasonably be expected to be available to meet anticipated demand. Of course, this assessment must take into account that the costs of bringing some supplies to

market may be so significantly higher than the anticipated market price that their use would be precluded in an efficient market. Alaskan Northwest and Foothills, however, have failed to demonstrate that the costs of any of the supplies considered by the DOE in Order 350, including gas producible at \$3.00-\$5.00 per Mcf in much more accessible areas than the North Slope, would be so high that they may not reasonably be considered available to meet anticipated demand during the term of the proposed export.

Second, assuming *arguendo* that need for a particular supply were determined solely by comparing predicted prices, Alaskan Northwest and Foothills have not provided credible evidence to permit such a comparison in this case. The price of \$3.00 per Mcf that they assert that North Slope gas delivered by ANGTS would cost at the U.S./Canada border is mere speculation since it is based on a North Slope

²⁷ *An Assessment of the Natural Gas Resource Base of the United States* (May 1988), prepared by Argonne National Laboratory for the DOE's Office of Policy, Planning, and Analysis.

²⁸ The \$0.54 figure appeared in a study by Dames & Moore and Decision Focus, Inc., included as Exhibit R to "Initial Comments" filed by Yukon Pacific on August 24, 1988. It was subsequently adopted by the ANGTS sponsors without any further explanation other than its use by Yukon Pacific. The Dames & Moore study did not say how it arrived at this figure.

²⁹ Alaskan Northwest asserts that the cost of transporting North Slope gas from the U.S./Canada border to Chicago and California would be \$0.50/Mcf. At the same time, it suggests that the costs of transporting lower-48 supplies from the wellhead to the city gate would be \$1.20. (See Alaskan Northwest's application for rehearing, appendix, at 20). Alaskan Northwest posits the \$1.20 figure by subtracting average domestic wellhead prices from average city gate prices. (See Energy Information Administration, *Monthly Energy Review*, July 1989, Table 9.11, at 109). The DOE believes this comparison is not appropriate and is misleading.

The DOE has looked at the current cost of delivering Canadian gas to Illinois and California by means of the Eastern and Western Legs of the prebuild (their present termini are in Iowa and Oregon) and the cost of delivering gas from traditional lower-48 sources. The data was derived from the Dun and Bradstreet "Official Pipeline Guide", a computerized

information system for determining least-cost point-to-point U.S. pipeline transportation charges. The results show that in February 1990 gas could be delivered from the Saskatchewan/Montana border via the Eastern Leg prebuild and certain interconnecting pipelines to central Illinois (Tuscola) for \$1.03/Mcf. It cost \$0.60/Mcf to transport gas from the British Columbia/Idaho border via the Western Delivery System (which comprises the Western Leg prebuild) to the Arizona/California border. Much of the supply for California originates in Texas and New Mexico and production in Oklahoma and Louisiana is shipped to Illinois. Gas could be transported from west Texas and New Mexico to the southern California border for \$0.27/Mcf. To transport gas from Oklahoma and south Louisiana to Tuscola would cost \$0.62 and \$0.46/Mcf, respectively.

In light of the current situation, it is reasonable to assume that there would be comparable transportation costs within the lower-48 states for North Slope gas and alternative supplies. In addition, with the advent of open-access transportation, domestic pipelines will continually be under pressure to keep prices competitive to attract customers. Furthermore, California would be able to acquire supplies from new production regions of the Rocky Mountains through the proposed pipelines of Wyoming-California Pipeline Company and Kern River Gas Transmission Company between Wyoming and California that received final FERC certificates early this year and are expected to begin operation in 1991 with transmission costs of \$0.64 and \$0.99, respectively.

wellhead price of \$0.54 per Mcf.³⁰ Alaskan Northwest offers no reason in its application for rehearing to persuade the DOE that North Slope producers consider \$0.54 a sufficient price to recover fully their costs. In fact, Alaskan Northwest admits:

One can only speculate about actual wellhead prices, as they will be determined through negotiations between individual producers and purchasers of North Slope gas. . . . [T]he wellhead price of \$0.54 (1987 dollars) . . . may be inaccurate.³¹

In addition, Alaskan Northwest and Foothills also argue that the presence of North Slope gas in various natural gas studies, including those of the Gas Research Institute, Data Research Institute/McGraw-Hill, and the American Gas Association (AGA), constitutes convincing evidence of the need for this gas in the lower-48 states.³² For example, Foothills' application for rehearing states, "AGA concludes that 'Alaskan gas becomes available before 2000 with the construction of a pipeline system to deliver those supplies.' (Emphasis added)."³³

The DOE did consider these studies but did not find them convincing concerning domestic need for North Slope gas.³⁴ They do not conclude that this gas is needed. At most, they conclude that this gas would be available to the domestic market if the ANGTS is built. Such a conclusion necessarily flows from the standard approach used for models involving North Slope gas. Forecasters program this gas supply into the models because they assume that ANGTS will be built and therefore that North Slope gas necessarily will flow through it some day to the lower-48 states. The consumption of North Slope gas in the lower-48 states is, in effect, a foregone conclusion of these models and the only variable is the completion date of

the ANGTS. As such, they reflect an assumption, and the possibility that it may be more efficient not to use North Slope gas in the domestic market is ignored. The DOE does not find the circular reasoning that relies on such studies to be enlightening when examining the domestic need for North Slope gas.

To summarize, Alaskan Northwest and Foothills have presented no new evidence or arguments that persuade the DOE to reconsider its determination that the export of North Slope gas is not inconsistent with the public interest. With respect to the environment, they provide no substantive basis to change the measures in Order 350 to protect the environment. With respect to domestic need, they give no compelling reason demonstrating that the analysis or conclusions in Order 350 were in error. Rather, they seek to confuse the possibility that North Slope gas may be consumed in the lower-48 states with a conclusion that North Slope gas is needed. The DOE's assessment was based on the outlook for natural gas demand, the outlook for supply, the availability of energy supplies with comparable or lower costs than North Slope gas, and the likelihood that the absence of North Slope gas would result in significant distortions in the U.S. energy market. As a result of this assessment, Order 350 concluded that North Slope gas is not needed in the lower-48 states during the 25-year term of Yukon Pacific's proposed export.

E. Order 350 Was Adopted in Accordance with All Applicable Statutory, Regulatory, and Procedural Due Process Requirements.

Throughout this proceeding, Alaskan Northwest and Foothills have contended that certain statutory, regulatory, and procedural due process requirements were not followed.³⁵ The DOE does not agree.

³⁰ For purposes of argument, the DOE is not questioning the transportation component of the \$3.00 price. However, the cost of service projected by the ANGTS sponsors from Alaska through Canada to the U.S. border of \$2.46, which is based on a June 1988 revised capital cost estimate for the remaining, unconstructed elements of ANGTS, has not been examined, much less approved, by any regulatory body.

³¹ See Alaskan Northwest's application for rehearing, at 19 and 23.

³² See Appendixes D-G attached to Foothills' application for rehearing.

³³ *Id.*, at 39.

³⁴ See Order 350, at 18-20, particularly note 36.

³⁵ See Alaskan Northwest's stated errors (7) and (8) in the appendix of this order; see also Foothills' stated errors (4), (6), (9), (10), and (11).

The DOE considered Yukon Pacific's application to export North Slope gas in accordance with all applicable statutory, regulatory, and procedural requirements. In particular, all parties were given the opportunity to submit written comments and reply comments and to participate in a public conference in Anchorage, Alaska. All parties were given ample opportunity to present arguments and data to support their positions and to examine thoroughly the positions of the other parties. Additional procedures were not and are not now necessary to develop more fully any disputed relevant and material factual issue.

Alaskan Northwest and Foothills have not demonstrated that any material issues of fact are genuinely in dispute or that any additional action, including a trial-type hearing, is necessary for a full and true disclosure of the facts. Alaskan Northwest and Foothills are not entitled as a matter of right to a trial-type hearing concerning policy or legal issues.

At every stage of this proceeding, the DOE has acted in accordance with all applicable statutory, regulatory, and procedural requirements. There exists a fully developed record, compiled with due regard for the rights of all parties, on which the DOE made a reasoned decision in Order 350.³⁶

F. Order 350 Does Not Restrict Improperly the Authority of Either FERC or OFI.

Alaskan Northwest and Foothills argue that Order 350 improperly limits the authority of the FERC and OFI.³⁷ There is no basis for this allegation.

With respect to the FERC, the DOE Act explicitly grants the Secretary of Energy all authority conferred under the NGA over imported and exported natural

gas. While the Secretary has retained the policy-making aspects of this authority within the DOE, certain technical aspects of this authority, especially in the areas where imported and exported natural gas mix with interstate gas, have been delegated to the FERC. The delegation of authority to the FERC is clear that this delegated authority over imported and exported natural gas must be exercised in accordance with the DOE's policies and any specific conditions in the DOE's import and export authorizations.³⁸

Order 350 limits the FERC's jurisdiction over this export project so that it would not exercise unnecessary regulation over the entire project merely because gas molecules destined for foreign countries may be combined with "interstate gas molecules" from ANGTS destined for lower-48 markets. Order 350 does not create any regulatory gap concerning the project and preserves the FERC's authority to regulate shared facilities where it has a legitimate interstate commerce interest. It also preserves the FERC's authority over the export site. By ruling out, on environmental grounds, all export sites except Valdez, Order 350 was exercising the site veto function retained within DOE. Order 350 does not affect the FERC's authority to approve or disapprove the Valdez export site.³⁹

With respect to OFI, Reorganization Plan No. 1 of 1987 explicitly provides that the Federal Inspector shall follow the policies of the agency from which the enforcement function the Inspector is exercising has been transferred. Order 350 sets forth DOE's policy that the "ANGTA condition" not be used as a dilatory tactic to impede the export project. Requiring this condition to be enforced expeditiously and on the basis of facts rather than speculation does not abridge the authority of the

³⁶ See Order 350, at 9-11.

³⁷ See Alaskan Northwest's stated error (4) specified in the appendix of this order; see also Foothills' stated error (7).

³⁸ See Order 350 note 18, at 7, note 32, at 16, note 34, at 17, and note 79, at 37. These footnotes detail (1) how the DOE Act granted the Secretary of Energy exclusive jurisdiction to regulate natural gas imports and exports, (2) how DOE Delegation Order No. 0204-127 delegates this broad grant of regulatory authority to the Assistant Secretary for Fossil Energy, (3) how DOE Delegation Order No. 0204-112 delegates the FERC limited authority under

sections 4, 5, and 7 of the NGA to regulate natural gas imports and exports in interstate commerce, subject to the policies of the DOE and any conditions in DOE import and export authorizations, and (4) how DOE Delegation Order No. 0204-112 delegates the FERC limited authority under section 3 of the NGA to regulate export and import sites, subject to the policies of the DOE, any conditions in DOE import and export authorizations, and the veto by the DOE of a particular site. See also *Trans-Canada Pipelines v. FERC*, No. 87-1229, June 16, 1989.

³⁹ See Order 350, at 41-44.

Federal Inspector to carry out the functions of the office.⁴⁰

G. Conclusion

The DOE issued Order 350 after a thorough examination of whether exports of North Slope gas would be inconsistent with the public interest. The DOE found that there are sufficient supplies of natural gas available in North America and elsewhere to meet anticipated domestic demand without market distortion if North Slope gas is exported. The DOE also found that the export of North Slope gas would be consistent with other public interest considerations, including protection of the environment.

The applications for rehearing filed by Alaskan Northwest and Foothills did not contain any basis for the DOE to reconsider its findings in Order 350. Alaskan Northwest and Foothills neither refuted the substantial record evidence on which these findings were based nor carried their burden concerning the statutory presumption in section 3 of the NGA that natural gas exports are consistent with the public interest.

Alaskan Northwest and Foothills sought in their applications for rehearing, as they have throughout this proceeding, to infer that this export application was different than other section 3 proceedings. Many of their arguments assert that the ANGTA framework, in effect, reverses the presumption favoring natural gas exports and creates different standards for evaluating exports of North Slope gas. Although the DOE can find no legal basis for such a proposition, it did consider the policy basis of the ANGTA framework in the context of the public interest standard of section 3 of the NGA. This consideration led the DOE to include the "ANGTA condition" in Order 350 to preserve the physical integrity of ANGTS. The DOE crafted Order 350 carefully to ensure that it did not interfere with any of the privileges of the ANGTS sponsors or their ability to negotiate contracts to secure North Slope reserves for ANGTS. Alaskan Northwest and Foothills, however, have not persuaded the DOE that either the public interest or any provision of the ANGTA framework requires it to interdict competition over North Slope gas.

Order 350 does not dictate how North Slope gas will be developed. Those decisions continue to be left to private parties. Order 350 merely complies with the DOE's obligation to authorize natural gas exports where there is no showing such exports would be inconsistent with the public interest. There is no provision in the ANGTA framework or elsewhere that changes this obligation in situations involving competition over North Slope gas.

III. Request for Clarification

On December 15, 1989, Yukon Pacific requested clarification or, in the alternative, rehearing of Order 350. Yukon Pacific asks the DOE to clarify that, in the event the quantity of LNG exported in a given year is below the annual volume limitation, it is authorized to increase exports in succeeding years to make up the deficiency. Yukon Pacific asserts that this would enhance its ability to develop and initiate long-term sales arrangements and would provide latitude should actual deliveries in some years prove to be smaller than anticipated.

The DOE's imposition of the 14 million metric ton (MMT) annual export ceiling was based on the perceived intention of Yukon Pacific to deliver only up to that volume and is reflective of Yukon Pacific's application. However, it is reasonable that Yukon Pacific be permitted to increase the quantity of LNG exported in succeeding years until it makes up any deficiency in a year in which deliveries did not equal 14 MMT, as long as the aggregate amount during the term of the authorization does not exceed 350 MMT.⁴¹ Accordingly, we are modifying Ordering Paragraph A of Order 350 in a manner that will give Yukon Pacific more flexibility to structure contracts tailored to the individual needs of its customers and to manage deliverability fluctuations.

IV. Decision

The applications for rehearing filed by Alaskan Northwest and Foothills present no information that would merit reconsideration of our findings in Order 350. Accordingly, their requests for rehearing are denied.

⁴⁰ *Id.*, note 83, at 41.

⁴¹ 14 MMT × 25 years = 350 MMT.

The application for clarification filed by Yukon Pacific involves a reasonable modification of the authority in Order 350 that does not affect the DOE's decision to grant the authorization. Accordingly, its request is granted.

ORDER

For the reasons set forth above, pursuant to section 3 and 19 of the Natural Gas Act, it is ordered that:

A. Ordering Paragraph A of DOE/FE Opinion and Order No. 350 (Order 350) issued November 16, 1989, to Yukon Pacific Corporation is hereby modified to read as follows:

A. Yukon Pacific Corporation (Yukon Pacific) is authorized to export for sale to Japan, South Korea, and Taiwan a total of up to 350 million metric tons (MMT) of liquefied natural gas (LNG), at an average annual volume of 14 MMT, for a period of 25 years beginning on the date of the first delivery, upon the conditions herein set forth.

B. All other terms and conditions of Order 350 remain in effect.

C. The application for rehearing of Order No. 350 filed by Alaskan Northwest Natural Gas Transportation Company and Foothills Pipe Lines (Yukon) Ltd. are denied.

Issued in Washington, D.C., on March 8, 1990.

Appendix

List of Errors in DOE/FE Opinion and Order No. 350 Alleged by Alaskan Northwest Natural Gas Transportation Company and Foothills Pipe Lines (Yukon) Ltd.

A. Alaskan Northwest *

(1) DOE's conditional export authorization, by failing to attach protective conditions to ensure compliance with ANGTA, represents an impermissible extension of DOE's statutory authority and, accordingly constitutes legal error in the following respects:

(a) DOE's Order threatens to " . . . compel a change in the basic nature . . . of the approved transportation system or would otherwise prevent or impair in

any significant respect the expeditious construction and initial operation" of the ANGTS and, accordingly, fails to comply with the mandate of section 9 of ANGTA;

(b) DOE's Order authorizes the diminution of the total quantity and quality of energy resources available to the U.S. on a price-competitive basis, in contravention of the mandate of section 12 of ANGTA;

(c) DOE's Order, with respect to its findings of possible future delivery of TAGS export volumes to American consumers, contravenes the exclusive right of the ANGTS to deliver North Slope gas to lower-48 states' consumers.

(2) DOE's Order contravenes the President's September 22, 1977, decision concerning ANGTS and prior U.S.-Canadian commitments.

(3) DOE's findings relevant to the analysis of "public interest" under section 3 of the NGA are (i) not supported by substantial evidence; and/or (ii) represent an abuse of agency discretion. In particular:

(a) DOE's findings respecting "domestic need" are not supported (and are, in fact, undermined) by record evidence;

(b) Insufficient record evidence has been developed to support claimed trade and other international benefits;

(c) DOE's findings with respect to impacts on national energy security, and the equating of national energy security to "global market efficiency" are not supported by record evidence and represent an abuse of discretion; and

(d) DOE's findings respecting environmental impact are incomplete and otherwise not supported by record evidence.

(4) DOE's limitation of Federal Energy Regulatory Commission (FERC) jurisdiction over the Alaskan Gas Conditioning Facility constitutes legal error.

(5) DOE has abrogated its statutory responsibilities under the National Environmental Policy Act (NEPA) by failing to consider environmental consequences associated with, *inter alia*, with: (1) gas

* See Alaskan Northwest's application for rehearing at 7-10.

conditioning arrangements for volumes proposed to be exported and (2) marine transportation hazards and interactions of LNG and oil tankers at Port Valdez and in transit through Prince William Sound.

(6) The issuance of export authorization to Yukon Pacific, in the absence of protective conditions urged by Alaskan Northwest, deprives the ANGTS sponsors of legal rights and priorities established through prior Congressional, regulatory and Presidential orders, the deprivation of which constitutes an unlawful taking under the Fifth Amendment of the U.S. Constitution.

(7) DOE's Order was issued without regard to requirements of procedural and substantive due process.

(8) DOE's failure to attach informational and filing requirements to mitigate potential regulatory gaps in arbitrary, capricious, and an abuse of discretion.

B. Foothills **

(1) DOE erred in finding that approval of the proposed export is consistent with the intent, policies, and framework of ANGTA.

(2) DOE erred in failing to recognize that approval of the proposed export is inconsistent with the Presidential and Congressional decisions approving the ANGTS under ANGTA.

(3) DOE erred in finding that approval of the proposed export is inconsistent with the 1977 U.S.-Canadian agreement on principles and other commitments made by the U.S. to Canada in connection with the ANGTS.

(4) DOE erred in finding that there is a statutory presumption favoring exports of Alaskan North Slope gas.

(5) DOE's approval of the proposed export is arbitrary, capricious, abusive of the government's discretion, and unsupported by either rational findings or substantial evidence of record.

(a) DOE erred in failing to take a hard look at all pertinent issues and to make rational findings with respect to those issues.

(b) DOE erred in approving the proposed export prior to completion and full consideration of the National Energy Strategy.

(c) DOE erred in finding that approval of the proposed export will not significantly impair the expeditious construction and operation of the ANGTS.

(d) DOE erred in finding that North Slope gas will not be needed during the term of the proposed export to provide American consumers with adequate gas supplies at reasonable prices.

(e) DOE erred in finding that the proposed export will not diminish U.S. energy security or otherwise adversely affect the quantity, quality, or price of energy available to American consumers.

(f) DOE erred in finding that approval of the proposed export would benefit American consumers, encourage increased energy production, create benefits for the State of Alaska that would not otherwise be available, and benefit international relations.

(g) DOE erred in finding that the proposed export project is environmentally acceptable.

(6) DOE erred in failing to comply with NEPA and the regulations thereunder.

(7) DOE exceeded its statutory authority in attempting to limit the FERC's jurisdiction over the TAGS project in the event TAGS and the ANGTS share a facility that is subject to the FERC's interstate commerce jurisdiction.

(8) DOE's approval of the proposed export constitutes an unlawful taking of property rights of the ANGTS sponsors.

(9) DOE erred in failing to enforce and follow its own regulations on exports of natural gas.

(10) DOE erred in failing to convene a trial-type hearing.

(11) DOE unlawfully deprived the ANGTS sponsors of procedural and substantive due process.

** See Foothill's application for rehearing at 13-14.

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STATE OF ALASKA
ALASKA GASLINE INDUCEMENT ACT
TRANSCANADA ALASKA COMPANY, LLC
and FOOTHILLS PIPE LINES LTD.
ALASKA PIPELINE PROJECT

A. EXECUTIVE SUMMARY

We have been requested to address aspects of the proposed Alaska Pipeline Project (or "Project") application filed by TransCanada Alaska Company, LCC and Foothills Pipe Lines Ltd. (collectively "TransCanada") pursuant to the *Alaska Gasline Inducement Act* ("AGIA") on November 30, 2007. We have been specifically asked to consider matters that could impact the timeline of the Project. As specified in the request for applications, TransCanada's proposal addresses the specific requirements of the AGIA and also included a timetable for the completion of various activities associated with bringing the Project to fruition.

The expected timing of the development phase of the Project is of critical importance in the assessment and quantification of the potential benefits that could result from the proposed Project. As such, it is necessary to understand the rationale underpinning TransCanada's forecasted schedule and the risks TransCanada has taken into account in its evaluation. In addition, we have attempted to identify other potential concerns and issues that could impact overall timing. This Report is restricted to an examination of the Canadian segment of the Project.

TransCanada has adopted a five and one-half year schedule for securing major Canadian pre-construction approvals, following the issuance of the AGIA License. TransCanada has expressed the view that it expects to rely on the *Northern Pipeline Act* ("NPA" or "Act") as the primary legislative vehicle through which necessary regulatory approvals have and will be coordinated in Canada. This is viewed by TransCanada as minimizing the time required to complete the above process. TransCanada has also identified a number of project risks that could result in delay.

While we agree that there are advantages associated with the prior NPA approvals received by TransCanada and the "single window" process provided by the NPA, based on the detailed assessment contained herein, it is our view that the schedule proposed by TransCanada represents a "best case" scenario that may be difficult to achieve.

Given the nature and magnitude of the Project, it is our view that one could reasonably expect that at least certain of the issues identified herein, or by TransCanada in its risk assessment, will be raised during the preparation and regulatory approval phases of the Project, with a resultant impact on timing. In our view, a timeframe of seven to eight years is more realistic, with the lower end of the range (seven years) having a higher probability of being achieved. A seven to eight year timeline, to complete the required pre-construction processes, may be the minimum for a Third Party pipeline project that does not have the advantage of the existing approvals obtained under the NPA.

As will be discussed herein, the strategy and approach ultimately adopted by TransCanada for the execution of its proposal will likely have a significant impact on its ability to achieve the proposed "best case" scenario. By this we mean that TransCanada will face a number of choices with regard to the strategy it will employ on various key project items. If TransCanada adopts a course of action that seeks to address concerns that have previously been expressed it may be able to mitigate the risk of delay identified herein.

By way of illustration, TransCanada maintains that it will pursue the completion of the Project under the NPA, to the exclusion of other legislation that arguably could be applicable to the Project, such as the *Canadian Environmental Assessment Act* ("CEAA") and the *Yukon Environmental and Socio-Economic Assessment Act* ("YESAA"). If TransCanada maintains this approach, it will likely face challenges from a variety of parties that could result in delay.

However, if TransCanada proposes or encourages a process that encompasses the requirements of all applicable legislation (even if under the umbrella of the NPA), it

may be able to materially mitigate the risk of a challenge in this regard. In our view, this could involve TransCanada proposing that the Designated Officer under the NPA adopt the standards and open, public processes embedded in legislation such as CEEA and YESAA, in order to achieve substantially similar levels of review and analysis as would be expected under such legislation; albeit still under the "single window" approach contemplated by the NPA. In addition, TransCanada could minimize inefficiencies and delays by seeking a single, coordinated process that addresses all regulatory and environmental requirements at the outset.

Another example is TransCanada's proposal to make use of only NGTL facilities in Alberta (in addition to the Pre-Build) to transport Alaskan gas. If TransCanada chooses to maintain the exclusive link to the NGTL system, it is likely to face challenges, with resultant delays. However, if TransCanada adopts a more flexible and expansive approach of assessing the most economic and efficient use of all available infrastructure to transport Alaskan gas, as well as accommodating the positions of shippers, it will likely be able to materially mitigate the risk of such challenges and hence the potential for delay.

The above attempts to illustrate that, to some extent, TransCanada will be the master of its own destiny. While the positions advanced in its AGIA filing may be characterized as TransCanada's "opening position," the degree to which TransCanada exercises flexibility in its business approach will have a direct impact on its ability to achieve the desired schedule. In this regard, we would expect that TransCanada would have an incentive to complete the Project in a timely manner, which should drive it towards minimizing such debates and challenges. TransCanada is a large and successful pipeline company that likely appreciates the dynamics that will be at play. As will be discussed herein, TransCanada has acknowledged that current requirements and standards should be used to assess an Alaska Pipeline Project filing. To the extent this is, in fact, achieved by a TransCanada filing, the above concerns could be mitigated. We have no reason to believe that TransCanada will not ultimately adopt a strategy that will seek to minimize opposition and, hence, maximize its chances of expediting the Project.

It is also important to note that the extended timeline suggested herein would not necessarily disadvantage TransCanada vis-à-vis any Third Party pipeline proponent that may seek to construct a pipeline from Alaska and into Canada. Many of the specific concerns identified herein would apply equally to any such Third Party, such as a detailed assessment of environmental and socio-economic considerations, the duty to consult First Nations, as well as, routing, land rights, and potential litigation. In fact, TransCanada would likely have an advantage due to such things as its existing Certificates, the "single window" approach adopted by the NPA and its easement in the Yukon. We also note that TransCanada has previously asserted that it has the exclusive right to build a pipeline from Alaska into Canada. While not commenting on the validity of this claim, we would expect that TransCanada would seek to enforce this right and oppose any Third Party project. This could result in a significant delay in any such project.

In the end result, based on the information available to this point, it is reasonable to expect that certain delays will be encountered by TransCanada. Consequently, it would appear prudent for the State of Alaska to also examine the somewhat more extended timeline of approximately seven years discussed herein, for the completion of the required pre-construction approval processes; in addition to the five and one-half year period reflected in the AGIA Application, as part of its assessment.

A summary of the significant issues that could impact timing of the proposed TransCanada project is outlined below. Greater detail on these, and other, matters is provided in the body of this Report.

1. Continued Applicability of the NPA Approval

As reflected in the past submissions of Alliance Pipeline Ltd. ("Alliance") and Enbridge Inc. ("Enbridge"), it is likely that certain parties will challenge the general applicability of the NPA to the circumstances confronting the Alaska Pipeline Project today. This argument also appears to be supported by statements made by producers, including ConocoPhillips and Exxon-Mobil. It is arguable whether certain of the objectives of the NPA are relevant today, given that one of the main purposes was to

facilitate the "efficient and expeditious planning and construction of the [then proposed] pipeline". Nonetheless, it is our view that the NPA and the Certificates awarded thereunder remain valid. Of note is the fact that the NPA was relied upon as recently as 1998 for authority to expand the Pre-Build facilities. As detailed below, the NPA does not provide direct guidance on the process or procedure that would be used to consider an Alaska Pipeline Project filing. Therefore, the challenge for TransCanada will be to encourage and facilitate a process under the NPA umbrella that accommodates current requirements and minimizes the risks of additional delays.

As well, we anticipate that there will be significant political pressure brought to bear for the Governments and regulatory agencies to "do the right thing" and assess such a massive undertaking under current regulations and standards; and not accept an authorization that was granted under circumstances that were very different. There may indeed be some legitimacy to the argument that the information from the distant past is stale and outdated; and that the basis upon which the previous evaluations were conducted no longer remain valid.

In our view, while TransCanada will have certain advantages because of existing approvals and the NPA process, there will likely be political pressure asserted to expose the Project to an extensive regulatory and environmental review process, similar to that employed regarding the examination of the Mackenzie Gas Project. In this regard, it is noteworthy that the Mackenzie Gas Project has taken some eight plus years from initial regulatory process design to anticipated receipt of major regulatory approvals. While these are material differences, the Mackenzie Gas Project process may be viewed as broadly analogous in terms of regulatory complexity to the Alaska Pipeline Project. In our view, there will clearly be an expectation that the Project will be exposed to a rigorous process and not provided any short-cuts because of past approvals.

2. Technical Concerns with the Application of the NPA

In our view, while the deemed Certificates of Public Convenience and Necessity granted to the Foothills affiliates under the NPA contain a measure of flexibility, it is certainly arguable that the new proposal, which reflects a substantially different flow

rate, economic cost and possibly even route changes, is outside the scope of the Project which was certificated pursuant to the NPA. The TransCanada proposal contains information on a number of these parameters which arguably are a "material" change from those previously approved. In our view, these changes in scope, etc. could expose TransCanada to a challenge respecting its reliance on the prior NPA authorizations. To the extent that TransCanada has to seek amendments to either the existing approvals or the governing legislation, to accommodate proposed changes, this could precipitate a protracted debate that could delay the process from moving forward.

3. Required Environmental Assessment

In its AGIA filing, TransCanada characterizes its proposed actions as an "update" to the information previously filed in support of the existing NPA approvals and the Terms and Conditions it must fulfill thereunder. At this time, TransCanada has indicated that it intends to rely on the NPA and is not required to conduct an assessment in accordance with the CEAA or YESAA. If TransCanada attempts to fulfill outstanding requirements via an expedited process that does not include a comprehensive environmental assessment, with full public input as contemplated by these statutes, or meet other applicable requirements, it could face challenges that the above-referenced environmental legislation should apply to the Project.

It is also clear that, absent the NPA, such legislation would indeed apply, and TransCanada would be required to conduct a comprehensive environmental assessment thereunder. As mentioned above, TransCanada has confirmed that it intends to adopt a transparent and public process and, as well, has confirmed that it will be updating the numerous technical environmental reports associated with the construction of the subject pipeline. These actions may in some measure mitigate opposition (and potentially litigation) over the Project. To the extent an open and comprehensive process is employed, the risk of a challenge could be reduced. Conversely, the opposite is also true. Given that the Yukon Government has indicated that it believes YESAA will apply to the Project, TransCanada would appear to have an incentive to accommodate a review process that addresses this concern.

4. Duty to Consult First Nations

Since the time of the approvals granted under the NPA, the obligations imposed upon both Project Proponents and Governments (Provincial, Territorial and Federal) with respect to the duty to consult First Nations has evolved considerably. As with any project proponent, TransCanada's failure to ensure that the currently recognized obligation to consult is completely fulfilled, would inevitably lead to challenges on behalf of potentially affected First Nations. A failure by the Crown to fulfill this duty has been one of the main stumbling blocks for project proponents when their undertakings could potentially have a significant impact on First Nations. To the extent TransCanada and the relevant Governments fulfill this obligation pursuant to the current requirements the Project risks will be reduced. Nonetheless, history would suggest that this is a likely basis for challenge. We note that this concern is not unique to a TransCanada proposal and would apply to any proposed pipeline project from Alaska that traverses First Nations lands or lands where the First Nations assert traditional uses. In fact, the work conducted by TransCanada to date should provide it with an advantage in this regard. We are not able to comment on the extent to which the relevant governments have engaged in consultation.

5. North American Free Trade Agreement ("NAFTA")

NAFTA did not exist at the time the NPA approvals were granted to TransCanada and the NPA was not grandfathered under NAFTA. As will be detailed below, certain NAFTA issues could arise which would potentially cause significant delays to the advancement of the pipeline proposal. It is worthwhile noting that the above referenced Joint Alliance/Enbridge submission expressly raises NAFTA issues as an area of concern. As such, it is apparent that these parties, and likely others, are attuned to this basis for challenging a TransCanada Application under the NPA.

6. Alberta Component of the Overall Project

TransCanada's Application did not describe the precise facilities that will be utilized to transport the Alaskan based gas once it reaches the B.C./Alberta border. While TransCanada identifies certain benefits associated with the use of Transportation

by Others, it appears that these comments are made solely in the context of using TransCanada's "Alberta System". In our view, it is likely that certain other pipeline carriers, including Alliance and Spectra, will argue that excess capacity or economic expandability on existing pipelines should be used for the transportation of Alaskan based natural gas. The information filed in the ongoing Alberta Inquiry into NGL matters, as well as a recent Press Release regarding a report by the Canadian Energy Research Institute on the capacity of the Western Canada Natural Gas Pipeline System, forecast that existing pipelines will have significant excess capacity by the time the Alaska Pipeline Project is proposed to be in-service. To the extent that TransCanada demonstrates a willingness to work jointly with third party carriers, it should be able to minimize debates that could cause material delays in the implementation of the Project. If such a debate arises, to the extent that TransCanada would be relying upon National Energy Board ("NEB") or Alberta Utilities Commission approval for additional facilities in Alberta (versus pursuant to the NPA) there will be a forum for such a debate. Otherwise, recourse to the Courts is likely.

7. Acquisition of Land Rights

It appears that TransCanada has obtained an "easement" across the Yukon, which should give it a timing advantage over any Third Party pipeline proponent. It also appears that, at this time, TransCanada does not have any secure rights to the necessary rights-of-way across British Columbia and Alberta. The acquisition of such rights in these two Provinces could take TransCanada, or any other project proponent, a considerable amount of time; and provide leverage to affected stakeholders. As such, while the NPA approvals would clearly give TransCanada an advantage over any third party pipeline proposal (particularly in the Yukon), the completion of the outstanding land acquisition process could create material delays. TransCanada's Application does not describe the precise manner in which it proposes to handle these outstanding land acquisition matters.

8. Fulfillment of Existing NPA Terms and Conditions

Even if TransCanada were successful in confining the process for examining the Alaska Pipeline Project to the "single window" approach advanced by the NPA, there is the matter of the extensive Terms and Conditions attached to the existing approvals. For example, the Designated Officer under the NPA can require that additional environmental information be filed in support of the Application. As such, it is possible that even if TransCanada were to succeed in technical arguments (likely following lengthy debate) that CEAA or YESAA do not apply, the Designated Officer could impose similar information requirements to ensure that a complete assessment of all applicable requirements is conducted for the length of the pipeline in Canada. In fact, there may be significant pressure to ensure that such an approach is followed.

Additionally, TransCanada will be required to meet other extensive conditions under the existing approvals prior to commencing construction. The exact process for a consideration of the information filed regarding these matters is uncertain, but could be the source of debate if a full public vetting is not accommodated.

9. Litigation

As will be detailed below, there are likely to be a significant number of "trigger points" which will provide the basis for a Court challenge. As noted below, there has already been litigation regarding the NEB's Northern Pipeline Decision involving First Nations and Environmental groups. Past experience suggests that such parties are well versed in their legal rights and have little hesitation in seeking recourse to the Court system when they are aggrieved. Likewise, commercial parties will often commence litigation if they are not satisfied with the outcome of commercial discussions. We also note that there has already been litigation involving a past Foothills Pre-Build application. While the past litigation was not successful, if such a challenge were to occur, it could result in a significant delay. This litigation concern would apply equally to any party seeking to build a pipeline from Alaska into Canada, as the facilities would likely have similar potential impacts on the environment and First Nations, regardless of the project proponent.

In our view, any single item identified above could result in a material delay to the schedule detailed by TransCanada in its Application. Based on the situation one could reasonably expect to evolve following TransCanada's filing, it is conceivable that several of these potential concerns could become a reality, with resultant delays to the schedule. As stated above, the extent to which the matters identified herein, or by TransCanada itself, actually lead to delays in TransCanada's proposed schedule will be impacted to a significant degree by the strategy TransCanada ultimately employs in pursuing the Project.

B. INTRODUCTION

The State of Alaska has requested that we provide our views on a number of issues associated with the November 30, 2007 Application filed by TransCanada pursuant to the AGIA. While a number of issues will be discussed regarding the TransCanada proposal, one of the primary mandates we have undertaken is to identify issues that could arise which would materially impact the proposed timeline for the completion of the pre-construction approvals phase of the Project put forward by TransCanada. After reviewing TransCanada's proposed timeline, we believe that it likely represents a "best case" scenario and is aggressive, in the sense that it will be difficult to complete all the identified tasks in the time allotted. However, we would logically expect a project proponent to adopt such an approach when bringing forth a proposal of this unique nature and magnitude. In essence, TransCanada has put forth a plan which assumes that it will not encounter any significant difficulties or delays in securing the major pre-construction approvals for the Project. In this regard, while we note that the TransCanada Application provides a "Key Risk Assessment and Mitigation" matrix, it does not provide a sensitivity analysis of, or a contingency for, the impacts (including on Project timing) that would be associated with certain events, that are arguably foreseeable, actually occurring. As such, should the matters identified by TransCanada or discussed below become a reality, it is likely that timing delays beyond the period forecast by TransCanada would occur.

In this Report we have attempted to incorporate consideration of a number of issues that could arise in the context of any Application (including a submission in the

form of a supplementary information filing) brought forward by TransCanada pursuant to the NPA to construct the remaining Canadian portion of the Alaska Pipeline Project. In our view, any such application would obviously be impacted by the filing of a "competitive" proposal by a Third Party(ies). In this regard, we note that ConocoPhillips prepared an application outside the AGIA process; and, more recently, BP-Conoco announced plans for a new Alaska pipeline project. These actions seem to confirm that other parties have a direct interest in developing an alternate pipeline proposal, and would likely be actively involved in any application brought forward by TransCanada. In fact, they may seek concurrent consideration of both proposals. It appears to be generally accepted that any pipeline proposal, including TransCanada's, would have to be supported by Alaskan natural gas producers for it to succeed. The complexities arising from "competing" proposals would almost certainly result in material delays. In this regard, we note that TransCanada has historically taken the stance that it has an "exclusive" right to build a pipeline from Alaska. While not commenting on the validity of such a claim, it seems likely that TransCanada would oppose any Third Party pipeline on this (and possibly other) basis. Such a development could result in a Third Party proposal encountering major delays from the outset.

In the past entities such as Alliance and Enbridge have made direct submissions to the Canadian Government with respect to the applicability of the NPA and the appropriate process that should be used to consider any pipeline application for the delivery of Alaskan gas (see: Joint Submission dated April, 2005). Press reports and submissions in the AGIA process continue to indicate that these parties are very interested in the potential development of an Alaskan Pipeline. A common theme identified by parties such as ConocoPhillips, Enbridge and Alliance is that they view a complete process under the *National Energy Board Act* ("NEB Act") and CEEA as being the appropriate approach to consider such an application. Other entities, such as the Government of the Northwest Territories, have also made submissions to the U.S. Senate Committee on Energy and Natural Resources (see: submission dated October, 2001) regarding proposals for the transportation of Alaskan natural gas.

In addition, we note that there has already been litigation with respect to the NEB's Northern Pipelines Decision and the application and scope of the NPA related to activities undertaken by Foothills as part of its Pre-Build. While this litigation confirmed the validity of the present authorizations, it may be indicative of the fact that various stakeholders, including Aboriginal and Environmental groups, will not hesitate to become actively involved in the overall governmental and regulatory/environmental process to consider such a Project. In our view, there is likely to be a strong correlation between the number of potential procedural or process challenges and a delay in the proposed schedule.

It is also of note that TransCanada's AGIA Application identifies some forty First Nations groups that it views as legitimate stakeholders in the Yukon and British Columbia, in addition to six regional Environmental groups that would be included in stakeholder consultation. We observe that this list does not address any Alberta based First Nations or Environmental groups; and does not take into account a number of national environmental entities that could easily become involved in a Project of this magnitude. From the above, it appears fairly clear that a large number of potential stakeholders will be very interested in any pipeline proposal ultimately brought forward by TransCanada. Such parties could seek to use any forum available to them to advance their positions, including recourse to the Courts.

In terms of the potential involvement of these parties, other intangible factors must also be considered. The fact that projects of this scope and magnitude do not take place very often, and hence will attract considerable attention, will inevitably act as an impetus for parties to use this venue as an opportunity to pursue public policy issues. This is also true of First Nations and Environmental groups who seldom get such a high profile forum to pursue issues of concern to them.

With respect to First Nations, it has been observed that the initial response of a number of Aboriginal entities located in the State of Alaska has been positive and they appear to be supportive of the Project. In our view, it is possible that a different response will be experienced in Canada. Canadian First Nations groups that could

potentially be impacted by the Project may not see this as a development that will have long term, material benefits for them. Rather, they will see this as a transient opportunity to obtain maximum benefits when their leverage is the greatest, which in our view is during the period when the project proponent is seeking to have the project approved and constructed. We expect that these parties may attempt to obtain commitments regarding such benefits during the approval process, which could lead to material delays. In fact, we would not be surprised to see certain First Nations use this Project as leverage in Land Claims Settlement discussions. History suggests that a common approach is to take actions which serve to impede the development of a project or cast doubts on its viability in furtherance of these objections. This does not mean that these parties are "opposed" to the Project *per se*, as absent the development, they would not get any of the benefits they seek to obtain. Rather, it is a case of attempting to use leverage when it is most advantageous. In our view, these concerns would be equally applicable to any third party pipeline project.

The same can be said of many Environmental groups, who will take a great interest in the potential impacts of the project and use any public forum available to attract attention to the environmental issues they will argue are not being adequately addressed by this development. The fact that a material portion of the Project is proposed to be constructed in proximity to the Alaska Highway is unlikely to deter such parties from vigorously pursuing their positions. While in many circumstances the concept of using a "Utility Corridor" is accepted as an approach that could assist in minimizing environmental impacts (versus another distinct right-of-way), this will not likely reduce the scrutiny of the proposal or allow TransCanada to avoid the full assessment of potential environmental impacts. The end result may well be that locating the Project in proximity to the existing highway will reduce impacts below those that would be experienced in a distinct corridor, but this is not likely to be the focus of concern. Rather, parties will likely focus on the potential impacts the proposed Project may have, as it is proposed. Thus, while locating the pipeline in proximity to an existing disturbance (the Alaska Highway) may be an advantage, it is not likely to diminish the opposition voiced by Environmental groups to any material degree. In this regard, any

proposal which attempts to utilize a route that is materially different from that previously contemplated could face additional challenges, with resultant delays.

C. BACKGROUND AND OVERVIEW OF THE NORTHERN PIPELINE ACT

In order to provide context for the views expressed herein, it is important to understand the background to the development of the *Northern Pipeline Act* and the Northern Pipeline Agency ("NP Agency"), that has been created to administer this legislation in conjunction with the National Energy Board. This will also provide insight into the current "approvals" and the outstanding requirements regarding same.

The NPA was enacted following a number of regulatory and government actions, including execution of the Canada-U.S. Treaty Concerning Transit Pipelines, extensive NEB hearings, and execution of the Canada-United States Agreement on Principles.

1. Canada-U.S. Treaty Concerning Transit Pipelines

In January 1977, an Agreement between the Government of Canada and the Government of the United States of America Concerning Transit Pipelines was executed (the "Treaty"). The Treaty affects all transit movements of hydrocarbons from and to one of the signatories, across the territory of the other. Under the Treaty, the parties agreed not to, amongst other things, interfere with oil/gas throughputs or discriminate with taxes, fees or charges. Under Article II, for example, "no public authority in the territory of either Party shall institute any measures, other than those provided for in Article V, which are intended to, or which would have the effect of, impeding, diverting, redirecting, or interfering with in any way the transmission of hydrocarbon in transit". The Treaty applies to various pieces of legislation, including the NPA.

2. National Energy Board Hearings

As noted by TransCanada in its AGIA Application, the NEB issued its 1977 Northern Pipelines Decision¹ in June 1977 following a lengthy (214 days) hearing in which the merits of two competing pipeline proposals for the transmission of Alaskan

¹ National Energy Board, Reasons for Decision, Northern Pipelines, 1977 (GH-1-75, AO-1-GH-2-75), [hereinafter, "Northern Pipelines Decision"].

gas through Canada were adjudicated.² These proposals were submitted by the Canadian Arctic Gas Pipeline Limited ("CAGPL") and Foothills Pipelines (Yukon) Ltd. ("Foothills"). The CAGPL proposal sought certificates of public convenience and necessity ("CPCN" or "Certificates") for delivery of Arctic Slope and Mackenzie Delta gas through a pipeline constructed along the coastal plain from Prudhoe Bay, Alaska, to the Mackenzie Delta and then south across Canada to Canadian markets and markets in the United States.³ In contrast, the Foothills proposal sought Certificates to construct pipelines and related works that would transport gas from Alaska through the Yukon along the Alaska Highway then south through Alberta to the United States. That process ultimately resulted in the selection of the proposal put forward by Foothills, now a wholly owned subsidiary of TransCanada Corporation.

The NEB in granting Certificates to Foothills, made them conditional upon Governor in Council approval, stating:

In respect of the Foothills (Yukon) project, although further engineering design, environmental and socio-economic information is to be filed prior to approval of final design, on the evidence the Board finds that it offers the generally preferred route for moving Alaska gas.⁴

In its Decision, the NEB discussed conditions that were to be placed on the Certificates and required Foothills to, amongst other things, alter its proposed route so that it would include the Dawson diversion or realignment (i.e. go near Dawson City) to facilitate construction of the Dempster lateral pipeline for the transmission of Mackenzie Delta gas; and to apply for a Certificate for the Dempster lateral.

In *Yukon Conservation Society and Council for Yukon Indians v. National Energy Board and Foothills Pipe Lines (Yukon) Ltd.* [1979] 2 F.C. 14, an appeal was lodged against the Board's 1977 Northern Pipelines Decision, on the grounds that the Board exceeded its jurisdiction by approving a route that was substantially different than that in

² TransCanada AGIA Application, page 2.2-73.

³ Robin L. Cowling, Canadian Institute of Resources Law, Calgary, Alberta, "Review and Regulatory Processes for Northern Pipeline Projects: Opportunities for Public Involvement", prepared for the Canadian Arctic Resources Committee, Yellowknife, NWT, November 2, 2001 [hereinafter "Review and Regulatory Processes"]

⁴ See: Northern Pipelines Decision, page 1-165.

the application. However, Foothills made a successful application for summary dismissal of the appeal on the grounds that the appeal was rendered academic by the *Northern Pipeline Act* of 1977.⁵

3. Canada-U.S. Agreement on Principles

Following selection of a project proponent and a route in both Canada and the U.S., the two countries entered into the *Agreement between Canada and the United States of America on Principles Applicable to a Northern Natural Gas Pipeline* (the "Agreement") on September 20, 1977.⁶ The Agreement provided for the construction of a gas pipeline to transport gas from northern Alaska and northern Canada to the United States.

Under section 2(a) of the Agreement the parties agreed as follows:

2(a) Both Governments will take measures to ensure the prompt issuance of all necessary permits, licenses, certificates, rights-of-way, leases and other authorizations required for the expeditious construction and commencement of operation of the Pipeline. ...

In this regard, the Agreement sets principles to coordinate and expedite the construction and operation of the pipeline system, and describes the route in general terms, divided into eleven zones (see: Annex I to the Agreement).⁷ The pipeline route is generally defined as following the Alaska Highway, with the Dempster lateral extending from a point near Whitehorse to the Mackenzie Delta.⁸

The Agreement also calls for, amongst other things, Foothills to demonstrate proof of financing before construction will be allowed to proceed.⁹

The Agreement specifically refers to the Transit Pipeline Treaty, which as noted, governs all existing and future transit pipelines in the U.S. and Canada and which

⁵ A. Black, "Legal Principles Surrounding the New Canadian and American Arctic Energy Debate", *Energy Law Journal*, Vol. 23:81.

⁶ TransCanada AGIA Application, page 2.2-74. As amended by exchanges of notes dated June 6, 1978 between the Governments of Canada and the United States of America: See NPA, Schedule I.

⁷ Agreement, article 1.

⁸ Agreement, Annex II, Zones 10 and 11. See: Review and Regulatory Processes, *supra*.

⁹ Agreement, article 4(a).

mandates non-discriminatory treatment. The Agreement has a term of thirty-five years and is renewed *automatically* unless a party chooses to terminate it with 12 months written notice.

As noted by TransCanada, in recognition of the magnitude and importance of the Project, the Canadian government took the unusual step of committing to enact specific legislation to statutorily enshrine the regulatory decision of the NEB and the terms of the Agreement:¹⁰

14. The two Governments recognize that legislation will be required to implement the provisions of this Agreement. In this regard, they will expeditiously seek all required legislative authority so as to facilitate the timely and efficient construction of the Pipeline and to remove any delays or impediments thereto.

The enactment of the NPA fulfilled Canada's obligation in this regard. In Canada there has been no legislation enacted providing for expedited certification of any project other than the Foothills project.¹¹

4. Northern Pipeline Act

Shortly after the NEB's Northern Pipeline Decision, the NPA came into force on April 13, 1978.¹² In essence, the NPA created an administrative and regulatory scheme to carry out and give effect to the *Agreement on Principles*. Presumably therefore, the legislation was originally intended to, amongst other things, ensure the "prompt issuance of all necessary permits, licenses, certificates, rights-of-way, leases and other authorizations required for the expeditious construction and commencement of operation of the Pipeline" as agreed by the Governments. As reflected in the objects of the Act, which are set out in Section 4 of the NPA, this was to be accomplished through measures aimed at facilitating efficient and expeditious planning, construction, consultation and coordination. As discussed below, given the significant lapse of time since the NPA came into force, debate may ensue regarding whether the legislation can

¹⁰ TransCanada AGIA Application, page 2.2-74.

¹¹ *Ibid.*

¹² Proclamation, SI/78-90, 13 April 1978, C. Gaz. 1978.II.2665.

and should be used to further this original purpose, particularly if current regulatory or environmental standards are not met.

The NPA consists of four Parts: Part 1 – Northern Pipeline Agency, Part II – Traffic, Tolls and Tariffs, Part III – Real Property and Part IV – General. It is appended by three Schedules. Schedule I is the Canada-US Agreement, Schedule II is a list of the Foothills companies who have received Certificates under section 21 of the Act, and Schedule III lists the terms and conditions of the Certificates.

Some of the key aspects of the NPA are described below.

a. Northern Pipeline Agency

The NP Agency was created with the proclamation of the NPA in April 1978. Its stated purpose is to oversee planning and construction of the Canadian portion of the Alaska Highway Gas Pipeline Project by the Foothills Group of Companies, which is the project conditionally approved under the NPA. Indeed, the Foothills Subsidiaries hold Certificates granted pursuant to section 21(1) of the NPA for each of the zones of the Project in Canada. These CPCN are declared in the NPA to be issued pursuant to section 52 of the NEB Act and are the only existing certificates for the Project in Canada.¹³ The pipeline, as certificated, is intended to transport Alaskan and possibly northern Canadian natural gas to southern markets in Canada and the United States.

The mandate of the NP Agency is twofold. It is required to carry out federal responsibilities in relation to the pipeline and facilitate the efficient and expeditious planning and construction of the pipeline taking into account local and regional interests, in particular those of native people. It is also responsible for maximizing the social and economic benefits from the construction and operation of the pipeline for Canadians while minimizing any adverse effect on the social and environmental conditions of the areas most directly affected by the pipeline.¹⁴

¹³ TransCanada AGIA Application, page 2.2-74. See also: NPA, s. 21(2). The Act states that these Certificates are "deemed to be a certificate issued pursuant to section 52" of the NEB Act.

¹⁴ Northern Pipeline Agency Canada website. Available at: <http://www.infosource.gc.ca>

The NP Agency, working in close conjunction with the NEB, was and arguably still is intended to provide a central regulatory authority or window for the exercise of all federal responsibilities related to planning, monitoring and controlling the system throughout Canada.¹⁵ Indeed, according to *Hansard*, the NP Agency is intended to serve as the only regulatory agency in charge of all federal responsibilities with regard to the Canadian part of the pipeline.¹⁶ According to TransCanada this approach offers advantages. Indeed, in its Application TransCanada states, "by creating a single window through which federal approvals and decision making can be delivered and provincial or territorial approvals can be coordinated, the NPA has proved to be an effective and efficient approach to timely and complete regulatory authorizations".¹⁷

In reality, the Agency has been essentially dormant for many years and has only "bare bones" staff in place at this time. Yet, as detailed below, in keeping with the Act, many regulatory powers of other federal departments and agencies related to the pipeline project have been delegated to the NP Agency. This is not the case however for those powers reserved exclusively to the National Energy Board or shared between the NEB and the NP Agency.¹⁸

The relative inactivity of the NP Agency in recent years follows from the fact that its activities are dictated by the timing and pace of construction of the ANGTS in Canada. As noted by TransCanada, while a portion of the ANGTS pipeline has been built in Alberta (the "Pre-Builds") under the authority of the NPA, the majority of this construction occurred in the early 1980's when the price of natural gas fell to levels that made the construction of the entire APP, from Alaska to market uneconomic.¹⁹ These unfavourable economic conditions led to indefinite delays in the completion of the northern portion of the pipeline ("Phase II"). Consequently, the NP Agency's activities have been limited. The most recent expansion under the NPA occurred in 1998 involving the installation of 113 km of 1067mm (42") diameter pipeline and compression and metering facilities downstream of Empress.

¹⁵ See: NPA Preamble; Section 4(b); and Commons Debates, February 13, 1978 at 2789.

¹⁶ Commons Debates, February 15, 1978, page 2892.

¹⁷ TransCanada AGIA Application, page 2.2-75.

¹⁸ Northern Pipeline Agency website available at http://www.infosource.gc.ca/inst/npa/fed02_e.asp

¹⁹ TransCanada AGIA Application, page 2.2-74.

Recently, more favourable market conditions have rekindled interest in exploring options for bringing Alaskan gas to markets. In response, the NP Agency has reportedly been taking measures to address the commitments of the Government of Canada that are embodied in the NPA.²⁰ According to a recent Treasury Board of Canada Report, during 2007-2008, it is anticipated that the NP Agency will continue to work with other federal agencies, provincial and territorial governments, First Nations and the public to meet the objectives of the NPA. Furthermore, "in anticipation of receiving detailed project plans from Foothills, the NP Agency has begun reviewing key issues, including environmental concerns and First Nations interests. During 2007-2008, the NP Agency will be occupied with the development of plans to regulate and facilitate the construction of the pipeline."²¹ This indicates that the NP Agency is aware that TransCanada may soon be in a position to proceed under the NPA and is in the process of preparing for such an eventuality. While these preparatory actions may serve to facilitate and expedite consideration of the detailed project plans, the status of current initiatives is far from clear given the limited public information available. At present, the approval process that may be followed by the NP Agency and the nature and extent of coordination are not known.

It seems clear, however, that in the event a detailed project plan is received and commercial arrangements to support construction of the project are finalized, the NP Agency would be called upon to significantly increase its activity levels. According to the referenced Treasury Board of Canada Report, the earliest this is expected to occur is 2008-2009. At present, the Agency's budget provides for only two FTE's, although it is recognized that the resource levels for future years may need to be adjusted depending on the actual level of activity in the Foothills project. Interestingly, the costs of the NP Agency are fully recovered from Foothills pursuant to section 29 of the NPA and determined in accordance with section 24.1 of the NEB Act and the NEB Cost Recovery Regulations.

²⁰ RPP 2007-2008 - Northern Pipeline Agency Canada, Treasury Board of Canada Report, available at: http://www.tbs-sct.gc.ca/rpp/0708/npa-apn/npa-apn01_e.asp.

²¹ RPP 2007-2008, *supra*

Likewise, the Treasury Board Report confirms that the NP Agency's jurisdiction extends only to the Foothills project, as authorized under the NPA. While it appears that Foothills intends to file detailed project plans to complete the project, and has asked that the NP Agency "prepare to expeditiously consider these plans and to facilitate construction", the natural gas producers "who hold the rights to extract gas in Alaska, have indicated their interest in applying for new certificates under the NEB Act to build a pipeline to bring the gas to markets south of the 60th parallel".²² Should such a competing Third Party proposal be filed, it would be subject to the NEB and CEAA approval process, typically applied to "Greenfield" pipeline projects, and not the NPA process. While the potential impact of the recently announced Major Projects Management Office can not be assessed with any degree of certainty at this point, it is our view that a third party project could take at least 7 – 8 years to complete. In this regard, we observe that Conoco's November 30, 2007 filing with the State of Alaska contained a timeline, which it characterized as "streamlined", that covered approximately 10 years from the establishment of the necessary framework to pipeline operations. Of this time, it appears that Conoco was allowing approximately 5 ½ years from the present time to the commencement of construction. Conoco described the "streamline" process as one that is completed "without delay". Given the numerous issues that Conoco or any other third party pipeline proponent (such as the recently announced BP/Conoco proposal) is likely to fail, we do not attach a high probability to actually being able to achieve this schedule.

b. Organizational Structure

The organizational structure of the NP Agency is defined by the Act, with specific responsibilities shared between the Minister, Commissioner, Administrator, Designated Officer and NEB. As TransCanada appears to be relying heavily upon the NPA for the requisite approvals, a brief examination of this organizational structure is warranted.

Minister of Natural Resources

²² *Ibid.*

The NP Agency reports to Parliament through the designated Minister who is responsible for the management and direction of the Agency. At present, the designated Minister is the Minister of Natural Resources ("Minister").²³

Under Section 10 of the NPA, the Minister is authorized to:

- Exercise the powers, duties and functions of other Minister's or agencies as may be transferred by the Governor in Council;
- Consult with provincial and territorial governments to coordinate and review the activities of the Agency and those governments;
- Enter into agreements with provincial and territorial governments as necessary to obtain the objectives of the Act and to coordinate and review the activities of the Agency and those governments;
- Oversee and survey all aspects of the planning, construction and procurement of the pipeline; and
- Consult with appropriate authorities of the United States for matters arising under the Agreement.

Consistent with the intent that the Agency act as a "single window", the Governor in Council ("GIC") may by order, transfer duties and functions of any federal minister, department or agency to the minister responsible for the NP Agency and that minister may carry out those duties and functions in relation only to the Canadian section.²⁴ Certain powers, duties and functions of the Ministers of Indian Affairs and Northern Development,²⁵ Environment²⁶ and Fisheries and Oceans²⁷ have been transferred to

²³ NPA at ss. 5(1) and (2). Although originally the Minister responsible for the NPA was the Minister of State for Economic Development, this was changed to the Minister for International Trade, and the Minister of Energy. P.C. 1979-2656, C. Gaz. 1979.II.3663 and SI/95-17. The Agency was transferred to the NRCan portfolio in February 2004.

²⁴ TransCanada AGIA Application, page 2.2-75. See also: NPA, s. 15.

²⁵ The transferred powers are those under the *Northern Inland Waters Act* and the *Territorial Lands Act*, P.C. 1980-2316, C. Gaz. 1980.II.3162. See Review and Regulatory Processes, *supra*.

²⁶ The transferred powers are those under the *Migratory Birds Act*, the *Clean Air Act*, the *Environmental Contaminants Act* and the *Canada Wildlife Act*, P.C. 1980-2316, C. Gaz. 1980.II.3162. See: Review and Regulatory Processes, *supra*.

²⁷ The transferred powers are those under the *Fisheries Act*, P.C. 1980-2316, C. Gaz. 1980.II.3162. See: Review and Regulatory Processes, *supra*.

the Minister "in relation to the pipeline only". Transfer of such authority is reported to have occurred in 1980. Furthermore, in 1983, the following additional powers, duties and functions were reportedly transferred to the Minister:²⁸

- The NEB under Parts I, II and III of the *Gas Pipeline Regulations*;²⁹
- The Minister of Indian Affairs and Northern Development to control, manage and administer certain territorial lands required for the pipeline;³⁰ and
- The Minister of Environment to administer, manage and control those lands in Kluane National Park Reserve required for the pipeline.³¹

This suggests that the Minister will be responsible for issuing a number of different approvals in respect of the pipeline other than those required under the NPA, including for example, approvals under the *Fisheries Act* in relation to the pipeline. As will be discussed below, this could have important implications, as normally such approvals could trigger the involvement of agencies such as the Canadian Environmental Assessment Agency ("CEA Agency"). Moreover, the ability of the NP Agency to undertake these activities will require additional senior staff, likely from other federal departments. In this regard, the GIC on the request of the Minister is authorized under Section 12(5) of the NPA to direct any department or agency of the Government of Canada to second to the NP Agency, for specified periods, officers and employees necessary for the proper conduct of the work of the NP Agency. As well, the Agency may obtain the advice and assistance of any department or agency of the Government of Canada.

²⁸ Review and Regulatory Processes, *supra*.

²⁹ P.C. 1981-2412, C. Gaz. 1981.II.2762 and P.C. 1983-1078, C. Gaz. 1983.II.1643. As the author notes in Review and Regulatory Processes, *supra*, these regulations were later repealed when they were consolidated with the *Oil Pipeline Regulations* to create the *Onshore Pipeline Regulations* (P.C. 1988-1719, C. Gaz. 1988.II.3790 and P.C. 1989-1091, C. Gaz. 1989.II.2991; *Onshore Pipeline Regulations*, SOR/99-294). An analysis of whether the Agency Minister has retained powers under the *Onshore Pipeline Regulations* that are akin to those previously transferred is beyond the scope of this research.

³⁰ *Transfer of Powers, Duties and Functions (Territorial Lands) Order*, P.C. 1983-3690, C. Gaz. 1983.II.4378.

³¹ *Transfer of Powers, Duties and Functions (Kluane National Park Reserve Lands) Order*, P.C. 1983-3692, C. Gaz. 1983.II.4380.

The Minister also has a number of specific responsibilities and duties under Schedule III of the NPA that must be satisfied prior to construction. For example, as described by R. Cowling:

"Foothills is required to submit to the Minister a detailed manpower plan and to design a program for Canadian participation and content in procurement of goods and services for the pipeline.³² The Minister also has responsibilities in relation to approving the financing of the pipeline, overseeing the costs incurred and projected for the pipeline and the progress of the planning and construction of the pipeline, as provided by Foothills in quarterly reports.³³"

The NPA also requires Foothills to provide proof to the Minister and the Board that the necessary regulatory approvals have been obtained before construction can commence³⁴

As noted by TransCanada, the responsible Minister is also authorized to undertake consultations and enter into agreements with the governments of the Provinces and Territories in Canada, as required, to co-ordinate all aspects of the project as they affect different jurisdictions.³⁵ As mentioned above, while there appears to have been some preliminary discussion regarding coordination of the required process, there is no evidence to support a position that this has been advanced to any meaningful degree. The overall process to coordinate the various bodies that could potentially be involved in the Alaskan Pipeline Project could take a considerable period of time (18-24 months). We would note that this was the recent experience with the Mackenzie Gas Pipeline.

The Commissioner

The NP Agency has one senior officer, a Commissioner appointed by the Governor in Council.³⁶ Acting under authority delegated by the Minister, the Commissioner serves as deputy head of the NP Agency in Ottawa and has prime

³² NPA, Schedule III condition 9-10.

³³ NPA, Schedule III condition 12-15.

³⁴ NPA, Schedule III condition 17.

³⁵ TransCanada AGIA Application, page 2.2-75.

³⁶ NPA, s. 6(1).

responsibility for advising the Minister on matters of policy. The Deputy Minister of NRCan has been Commissioner of the NP Agency since February 2004 (currently Cassie J. Doyle).³⁷ At present, the only office in the NP Agency that is staffed is the Office of the Commissioner, which maintains a small support staff. The Commissioner has reportedly appointed the Comptroller as Assistant Commissioner of the Agency.

Given the low level of activity, arrangements are reportedly in place whereby the NP Agency relies largely on NRCan for administrative and technical assistance. The NPA also receives policy advice from NRCan and other federal departments.³⁸

The Administrator and/or the Designated Officer

Provision is made under the NPA for appointment by the GIC of an Administrator to assume responsibility for day-to-day operations of the NP Agency.³⁹ The GIC can appoint an officer to be called the Administrator or can appoint a member of the NEB to be the Administrator⁴⁰, in which case the person is referred to as the Designated Officer.⁴¹ At the present time, based on the information available, it appears that the Administrator and Designated Officer positions are vacant.⁴²

Although the office is currently vacant, it is important to note that the Designated Officer is granted broad powers under the NPA including the power to, in respect of the pipeline, exercise and perform any of the powers, duties and functions of the NEB, as delegated by order of the NEB, except those as exempted under subsection 7(1) of the NPA.⁴³ The materials examined indicate that a number of NEB Orders were made in 1978 and 1983 to delegate responsibilities to the Designated Officer. However, these

³⁷ RPP 2007-2008, Northern Pipeline Agency Canada.

³⁸ RPP 2007-2008, Northern Pipeline Agency Canada.

³⁹ NPA, s. 6(2).

⁴⁰ *Ibid.*

⁴¹ "Designated Officer" is defined in ss. 2(1) and 6(4). See Review and Regulatory Processes, *supra*.

⁴² RPP 2007-2008, Northern Pipeline Agency Canada.

⁴³ NPA, ss. 6(2) and 7(1).

were later revoked in 1985.⁴⁴ The result being that these responsibilities again reside with the NEB.

The Act also grants the Designated Officer direct powers. For example, it authorizes the Designated Officer to:

- Certify copies of the approved plan, profile and book of reference, and to certify certain permits under the NEB Act,⁴⁵
- With the concurrence of the Minister, to issue such orders and directions to Foothills and grant such approvals as may be necessary to carry out the terms and conditions of the Certificates,⁴⁶ and
- The Board or the Designated Officer may rescind, amend or add to the terms and conditions set out in Schedule III or deemed to be set out therein (with the approval of the Governor in Council).⁴⁷

Furthermore, the NPA authorizes the Minister to transfer Ministerial powers, duties and functions to the Administrator.⁴⁸

The NEB

As noted, the Foothills Subsidiaries hold Certificates granted pursuant to section 21(1) of the NPA for each of the zones of the Project in Canada. These Certificates are declared in the NPA to be issued pursuant to section 52 of the NEB Act.⁴⁹

⁴⁴ See NEB Orders No. NPO-1-78, AO-1-NPO-1-78, AO-2-NPO-1-78 and RO-NPO-1-78. As referenced in: Review and Regulatory Processes, *supra*.

⁴⁵ NPA, s. 7(2)(a).

⁴⁶ NPA, s. 22(1).

⁴⁷ NPA, s. 21(4). See for example, the five Zone Specific Socio-Economic and Environmental Terms and Conditions discussed in more detail below.

⁴⁸ NPA, s. 6(3). It is reported that in 1980, certain of the Ministerial powers, duties and functions were granted to the Administrator for the Pre-Build sections only. See: Review and Regulatory Processes, *supra* at 80: "The Minister of State and Economic Development delegated the authority to the Administrator to exercise and perform the Ministerial concurrence required by section 22(1) [then section 21(1)] in regard to some of the orders, directions and approvals issued or granted by the Designated Officer to the Pre-Build sections of the pipeline, see Lucas, Appendix 3."

⁴⁹ NPA, s. 21(2). TransCanada AGIA Application, page 2.2-74.