FOOTHILLS PIPE LINES LTD.

Northern Backgrounder

AUGUST 2000
# TABLE OF CONTENTS

I. EXECUTIVE SUMMARY .................................................................................................................. 1

II. BACKGROUND .............................................................................................................................. 6

III. THE DECISIONAL PROCESS IN CANADA AND THE UNITED STATES ................................. 8
    A. THE RECOMMENDATION OF THE FPC .................................................................................. 9
    B. THE REASONS FOR DECISION OF THE CANADIAN NEB .................................................. 9
    C. THE TRANSIT PIPELINE TREATY ....................................................................................... 10
    D. THE AGREEMENT BETWEEN CANADA AND THE U.S. ....................................................... 10
    E. THE U.S. PRESIDENT'S DECISION AND REPORT TO CONGRESS ..................................... 11
    F. U.S. CONGRESSIONAL APPROVAL OF THE ANGTS .......................................................... 12
    G. CERTIFICATION OF THE ANGTS BY THE FERC ................................................................. 12
    H. THE CANADIAN NORTHERN PIPELINE ACT ..................................................................... 13
    I. THE 1981 WAIVER OF LAW ................................................................................................. 13

IV. THE ANGTS PREBUILD PROJECT ............................................................................................ 14
    A. THE PREBUILD CONTRACTS ................................................................................................. 14
    B. CANADIAN AND U.S. PREBUILD REGULATORY APPROVALS ........................................... 16
    C. CONSTRUCTION OF THE PREBUILD .................................................................................. 22
    D. SUBSEQUENT PREBUILD DEVELOPMENTS ...................................................................... 23

V. PRESIDENTIAL FINDING ON ALASKAN GAS EXPORTS ......................................................... 27

VI. COMPLETION OF THE ANGTS ................................................................................................. 27

VII. THE BAYER REPORT ............................................................................................................... 30

VIII. 1999 NORTHERN BORDER RATE CASE ............................................................................. 31

IX. THE MACKENZIE VALLEY PIPELINE PROJECT ..................................................................... 33

X. OTHER DEVELOPMENTS ALASKA NORTH SLOPE PROJECT ............................................ 34

946

DOE002-0956

Obtained and made public by the Natural Resources Defense Council, March/April 2002
I. EXECUTIVE SUMMARY

- In 1977, Canada and the United States signed an Agreement for the construction and operation of the Alaska Natural Gas Transportation System ("ANGTS"), a 5,000-mile pipeline project which would traverse Canada and provide the U.S. with access to its Alaskan gas reserves.

- In the Agreement the two governments designated Foothills Pipe Lines Ltd. ("Foothills") as the company responsible for the construction and operation of the Canadian segment of the system and the U.S. sponsors.

- In September 1977, President Carter issued his Decision and Report to Congress on the Alaska Natural Gas Transportation System. In that decision, the ANGTS was found to be the most economic and environmentally sound means of transporting Alaskan gas to markets in the lower forty-eight states.

- The President's Decision and the Agreement were ratified by the U.S. Congress in late 1977, whereupon the U.S. Federal Energy Regulatory Commission ("FERC") issued certificates of public convenience and necessity to the U.S. sponsors for the construction and operation of the U.S. segments of the project subject to meeting certain conditions related to construction costs and schedule, finance and environment.

- In April 1978, the Canadian Parliament enacted the Northern Pipeline Act which granted certificates of public convenience and necessity to the Foothills subsidiaries responsible for the construction and operation of the 2,000-mile Canadian segment of the ANGTS. The Act also established the Northern Pipeline Agency and gave it authority to oversee the construction of the system in Canada.
One of the main reasons for the United States' selection of the trans-Canadian ANGTS was the President's belief that it would "provide the opportunity to obtain additional gas at an earlier date by early construction of portions of the southern Canadian and lower 48 sections ... with delivery of gas from Alberta ... in advance of delivery of Alaskan gas."

To make prebuilding a reality, Pan-Alberta Gas Ltd. ("Pan-Alberta"), a Canadian marketing company, signed two contracts in 1978 under which it agreed to supply Northwest Alaskan Pipeline Company ("Northwest Alaskan") approximately 800 MMcf/d for delivery through the Eastern Leg of the ANGTS and approximately 240 MMcf/d for delivery through the Western Leg. In addition, Pan-Alberta signed several gas sales and transportation contracts, including a transportation agreement with Foothills for delivery of gas to the Eastern and Western Leg delivery points on the international border.

In 1980, the Federal Energy Regulatory Commission ("FERC"), as a successor to the Federal Power Commission ("FPC"), issued a series of orders approving the Prebuild phase of the ANGTS.

On July 1, 1980, Congress passed a Joint Resolution which reaffirmed congressional support for the ANGTS. After finding, among other things, that prebuilding would "enable this Nation to obtain Canadian natural gas to displace two hundred thousand barrels of foreign oil a day," the Joint Resolution declared that "it is the sense of Congress that the [ANGTS] System remains an essential part of securing this Nation's energy future and, as such, enjoys the highest level of Congressional support for its expeditious construction and completion ..."
On July 18, 1980, President Carter wrote Prime Minister Trudeau a letter expressing the United States' support for prebuilding and for completion of the remainder of the ANGTS.

Based upon the commitments of the FERC, the President, and the Congress, the NEB issued a decision in July 1980 finding that the financing conditions of the Northern Pipeline Act, as amended, had been satisfied, and that prebuilding the Canadian segment of Phase I of the ANGTS could go forward.

Subsequent to the Canadian government's approval of the Prebuild Project, and in reliance upon the U.S. commitments described above:

- Foothills invested approximately one billion dollars in prebuilding 528 miles of the 2000-mile Canadian segment of the ANGTS;

- Canadian producers invested approximately one billion dollars (Canadian) in the construction of production, plant, and gathering facilities; and

- NOVA invested approximately $500 million in providing capacity within its intraprovincial pipeline system to transport the Prebuild volumes from numerous Alberta fields to interconnections with the Foothills system.

Since the initiation of gas deliveries through the ANGTS Prebuild Project, which occurred in 1981 on the Western Leg and in 1982 on the Eastern Leg, the Prebuild contracts have been renegotiated in response to
changing conditions in the U.S. gas market while remaining consistent with the integrity of the ANGTS regime. Consistent with the ANGTS regime, the new amendments have been expeditiously approved by regulatory agencies in both Canada and the United States.

Foothills has invested approximately $500 million in expansions to the Prebuild during the 1990’s under the ANGTS regime. Of particular note, in 1993, Foothills expanded its Western Leg facilities in South B.C. which added roughly 850 MMcf/d, increasing system capacity to 1094 MMcf/d. In 1998, Foothills completed an expansion of its Eastern Leg facilities in Saskatchewan which represented the largest system expansion, increasing contract capacity to 2.2 Bcf/d.

As a result of market conditions in the U.S. lower 48, the completion of Phase II of the ANGTS has been deferred. Recent events and prospects for higher gas demand in the lower 48 make construction of the northern segments of the project more likely than at any time since the early 1980’s. The ANGTS sponsors remain committed to completing Phase II in a timely manner. Sponsors continue to take appropriate actions and expend funds necessary to maintain the ANGTS regime in a state of readiness: including efforts focused upon substantially reducing the cost of transporting Alaskan North Slope gas to market.

Since the inception of the project, the ANGTS sponsors have made substantial progress toward the eventual completion of the ANGTS. Right-of-way permits and easements have been granted and their terms extended where necessary for much of the system; a broad array of regulatory authorizations have been issued by Canadian and U.S. regulatory authorities; and the U.S. Congress has approved waivers of
In 1992, the Canadian government and Foothills extended the term of the Easement Agreement in Yukon for twenty years at a minimum.

In January, 1988, President Reagan issued a finding that exports of Alaskan gas would not decrease the quantity, nor increase the price, of energy available to the United States. However, the finding reaffirmed the President's support for the unique regulatory treatment of the Prebuild Project. The finding also indicated that the President still supported the completion of the ANGTS.

In January, 1992, the U.S. Federal Inspector for the ANGTS, sent the President a report which recommended abandonment of the entire ANGTS legal infrastructure, including the bilateral agreement with Canada. While the ANGTS sponsors did not object to abolition of the Office of the Federal Inspector, they strongly opposed abrogation of the core ANGTS authorities – i.e., the Alaska Natural Gas Transportation Act, the President's 1977 decision, and the bilateral agreement with Canada. Although the Office of the Federal Inspector was dismantled, that authority now resides with the Department of Energy. The recommendation to abandon the ANGTS legal infrastructure was rejected.

On June 30, 1999, the Federal Energy Regulatory Commission issued an "Order Accepting and Suspending Tariff Sheets, Subject to Refund and Hearing" in the 1999 Northern Border Pipeline Company Rate Case. The Order included a statement that the "ANGTS is no longer viable". Foothills requested clarification of that statement, arguing that it was not only factually incorrect, but counter to important commitments which have been made by the United States government to the Canadian sponsors and the Canadian government regarding the ANGTS.
Canadian Government also requested that the FERC clarify its statement to avoid creating uncertainty with respect to the U.S. commitments to its treaty with Canada and the ANGTS. The FERC subsequently clarified the order consistent with the request of Foothills and Canada in an expeditious manner.

The Canadian and U.S. governments and their agencies have consistently supported the Prebuild and completion of the ANGTS in accordance with the Canada/U.S. Agreement.

As the Canadian sponsor of the ANGTS and a partner in the Alaskan segment of the Project, Foothills believes that it is important for public and private parties to be familiar with the history of the project, the benefits of the Prebuild Phase, and the steps to complete the remainder of the system in the years ahead. Accordingly, this briefing document has been prepared.

II. BACKGROUND

Controversy over the best means of transporting Alaskan gas to markets in the lower forty-eight states began as early as the late 1960's, when extensive oil and gas reserves were first discovered in the area of Prudhoe Bay. For purposes of this discussion, however, it is sufficient to begin with the Alaska Natural Gas Transportation Act ("ANGTA"), which was passed by the U.S. Congress and signed into law in 1976.

Through ANGTA, Congress sought to ensure that the construction and operation of an Alaska natural gas transportation system would not be delayed by the type of administrative and judicial problems which had plagued the trans-Alaskan oil pipeline and other major energy projects during the early 1970's. To
that end, ANGTA established a special procedural framework which would permit the U.S. President and the Congress to make a final decision on an Alaska natural gas transportation system, but only after substantial input from other U.S. agencies and interested parties. Among other things, the Act specifically provided for:

(a) a recommendation to the President from the Federal Power Commission ("FPC"), which was the predecessor to the Federal Energy Regulatory Commission ("FERC");

(b) an opportunity for other U.S. agencies, states, and interested parties to comment on the recommendation;

(c) a Presidential decision and report to Congress on an Alaskan natural gas transportation system; and

(d) Congressional review of the Presidential decision.

ANGTA also established specific procedures to prevent undue governmental delay in achieving the most expeditious completion of the transportation system ultimately approved by the President and Congress. In particular, U.S. regulatory agencies are required to expedite all proceedings relating to the construction and initial operation of the system; U.S. officials are prohibited from taking any action which would either change the basic nature and general route of the chosen system or impair its expeditious completion; and the scope of judicial review of regulatory actions relating to the chosen system is severely limited.
III. THE DECISIONAL PROCESS IN CANADA AND THE UNITED STATES

At the time of ANGTA's enactment, comparative hearings were in progress before the FPC on three competitive proposals for an Alaska natural gas transportation system. Specifically, those proposals were:

(1) the Arctic Gas Project, which proposed an overland pipeline extending from Prudhoe Bay, across the North-Slope of Alaska to the Canadian Mackenzie Delta, and thence southerly through Canada to the lower forty-eight states;

(2) the El Paso LNG Project, which proposed an overland pipeline extending from Prudhoe Bay to southern Alaska, where the gas would have been liquefied and transported by tankers to terminals in the western United States; and

(3) the Alcan Pipeline Project – referred to in Canada as the Alaska Highway Pipeline Project – which proposed an overland pipeline extending from Prudhoe Bay to Fairbanks, Alaska, and thence southeasterly through western Canada to the lower forty-eight states.

Two of these proposals – namely, the Arctic Gas Project and the Alaska Highway Pipeline Project (or Alcan Pipeline Project) – were also pending before the Canadian National Energy Board ("NEB") at the time of the enactment of ANGTA. The El Paso LNG Project was not before the NEB because it was an "all American" project which did not propose a pipeline across Canada.
However, Canadians were concerned about a LNG route along the west coast of Canada.

A. The Recommendation of the FPC

On May 1, 1977, following extensive hearings in which every facet of the competitive proposals was explored, the FPC issued its Recommendation To The President. In that recommendation, the four sitting commissioners unanimously agreed that it would be in the public interest of the United States to construct an overland pipeline for the transportation of Alaskan gas to markets in the lower forty-eight states. As to which overland system should be selected, however, there was initially a split of opinion. Two commissioners unconditionally recommended the Alcan project. The other two stated that if the Government of Canada selected the Alcan route, the Alcan project should be approved.

B. The Reasons For Decision Of The Canadian NEB

On July 4, 1977, following two years of competitive hearings which had paralleled the hearings before the FPC, the NEB issued its Reasons for Decision, Northern Pipelines. In that decision, the NEB rejected the Arctic Gas proposal and recommended an overland pipeline to the Canadian Governor-in-Council.

The NEB's decision was also important because it indicated that international approval of the Alaska Highway Pipeline Project might provide a basis for making additional Canadian gas available to the United States prior to the flow of Alaskan gas. Specifically, the NEB stated:

"Assuming ... that Alaska gas is to be connected to markets by a land bridge through Canada, it could be

955
possible to pre-build some of the southern Canada and northern United States pipeline capacity to market gas which may be surplus to Canada's requirements in the late 1970's and early 1980's.\textsuperscript{3}

As discussed more fully below, this concept of "pre-building" certain portions of the system, in order to provide the United States with early deliveries of Canadian gas to satisfy lower 48 market needs, was considered to be one of the principal advantages of the Alaska Highway Pipeline Project when it was approved by the United States.

C. The Transit Pipeline Treaty

The large discoveries of hydrocarbon supplies in Alaska and the anticipated use of pipelines across Canada to access these reserves as well as Canada's use of U.S. pipelines as a conduit to connect Canadian markets led Canadian and U.S. authorities to develop a treaty providing for non-discriminatory treatment. In September, 1977, the "Transit Treaty" was signed which effectively provides that neither country will interfere with the transportation of hydrocarbons regardless of source or market and will not impose any discriminatory tax or monetary charge which does not apply to similar pipelines used for domestic transportation.

D. The Agreement Between Canada And The U.S.

Following the consummation of the Transit Pipeline Treaty and the issuance of the FPC and NEB recommendations, officials of the Canadian and United States governments began negotiations in the summer of 1977 to determine whether an overland pipeline through Canada could be finally approved on terms and conditions acceptable to both countries. As a result of these negotiations, the two countries, on September 20, 1977, signed an
"Agreement Between Canada and the United States of America Applicable to a Northern Natural Gas Pipeline." This agreement endorsed the Alaska Highway Pipeline Project, set out the general routing for the Project and designated Foothills Pipe Lines Ltd. ("Foothills") as the Canadian sponsor and the ANNGTC as the sponsor of the Alaskan segment. Northern Border Pipeline Company and the Pacific Gas Transmission Company were identified as lower 48 sponsors. It also committed the United States and Canadian governments to discharge their regulatory responsibilities in a manner that would facilitate the expeditious construction of the project in accordance with the terms of the agreement. The Agreement has an initial term of 35 years and continues beyond 2012 unless terminated on one year's notice by either party.

E. The U.S. President's Decision and Report to Congress

On September 22, 1977, as required by ANGTA, the President issued his Decision and Report to Congress on the Alaska Natural Gas Transportation System. In that decision, the President determined that it was in the best interest of the American people to have the Alaskan gas reserves transported to market at the earliest possible date. He further determined that the project identified in the Canada/U.S. Agreement was the most economic and environmentally sound means of accomplishing this goal.

In its discussion of the advantages of the ANGTS as compared to the other competing proposals, the President's Decision emphasized that the system would:

"... provide the opportunity to obtain additional gas at an earlier date by early construction of portions of the southern Canadian and lower 48 sections of [the system] ... with delivery of gas from Alberta (where
there is a temporary excess supply) in advance of the delivery of Alaska gas.  

The Decision further recognized that:

"A pre-delivery arrangement involving Alberta gas would provide stimulus to exploration for additional supplies in that province by providing producers with additional markets for their gas."  

Having selected the ANGTS, the President's Decision specifically identified the facilities to be constructed by the sponsors of the project. In accordance with the Agreement, Foothills was identified as the company responsible for the construction and operation of the Canadian segment of the project.

F. U.S. Congressional Approval Of The ANGTS

On November 2, 1977, the U.S. Congress passed a joint resolution which ratified the President's Decision. With the signing of this resolution by the President on November 8, 1977, the complicated process of selecting an Alaskan natural gas transportation system came to an end in the United States.

G. Certification Of The ANGTS By The FERC

In view of the President's Decision and the ratification of that decision by Congress, the FERC issued an order on December 16, 1977, which, among other things, granted certificates of public convenience and necessity to Alcan Pipeline Company, Northern Border Pipeline Company ("Northern Border"), and Pacific Gas Transmission Company ("PGT"). These certificates were subject to the satisfaction of certain conditions related to construction costs and schedule, finance and environment. Alcan's certificate for the Alaskan segment
of the ANGTS was subsequently transferred to its successor-in-interest, Alaskan Northwest Natural Gas Transportation Company ("Alaskan Northwest"), which has remained the sponsor of the Alaskan segment of the project.

H. The Canadian Northern Pipeline Act

On April 4, 1978, the Northern Pipeline Act was passed by the Canadian Parliament and proclaimed on April 12, 1978. Among other things, the Act granted certificates of public convenience and necessity to the Foothills subsidiaries responsible for constructing the Canadian segment of the ANGTS. In addition, the Act established the Northern Pipeline Agency, with the authority to oversee the construction of the system in Canada. The Agency was established as a single window for regulatory oversight of the project in order to co-ordinate and facilitate expeditious project approvals.

Similar to the United States, conditions were placed on the certificate. These conditions exhibit the inherent flexibility necessary for the certificates to be responsive to conditions which exist at the time the project proceeds. Again, as in the United States, the certificates do not have a sunset clause.

I. The 1981 Waiver of Law

By 1981, it had become increasingly apparent that the 1977 Presidential Decision and the U.S. Natural Gas Act contained certain provisions which were obstacles to the private financing of the ANGTS. In keeping with its commitments to the project, however, the U.S. Congress, at the request of the President, passed a resolution in late 1981 which waived these provisions, thereby paving the way for the remainder of the project to be financed as soon
as the U.S. market requires Alaskan gas. Subsequently, the waiver of law was challenged, but it was upheld by the United States Court of Appeals.

In summary, the 1981 waiver of law eliminated essentially four hurdles at that time to the financing of the remainder of the ANGTS. First, it permitted the North Slope producers to participate in the ownership of the ANGTS. Second, it included the North Slope conditioning plant as an integral part of the overall ANGTS, which is entitled to special protections under ANGTA. Third, it authorized the FERC to approve payment of Foothills' cost of service as soon as the Canadian segment of the project is capable of operation provided that such date is not before a date certain established in FERC's final certificate for the completion of the entire system. Finally, the waiver prohibited the FERC from changing the provisions of final rules and orders approving any tariff in any manner that would impair the recovery of operation and maintenance expenses, actual current taxes, and amounts necessary to service debt for the ANGTS.

The Waiver is permissive in nature, allowing the implementation of these provisions, while not precluding the negotiation of alternative commercial arrangements.

IV. THE ANGTS PREBUILD PROJECT

A. The Prebuild Contracts

Consistent with the desire to have the southern portions of the ANGTS prebuilt in order to transport Canadian gas in advance of Alaskan gas, Pan-Alberta signed two contracts in 1978 under which it agreed to supply Northwest Alaskan Pipeline Company ("Northwest Alaskan") with approximately 1.04 Bcf of new Canadian gas exports per day over a twelve-year period. Under the Eastern Leg contract, Pan-Alberta agreed to sell Northwest Alaskan approximately 800,000 Mcf per day, to be delivered at a point on the
international border near Monchy, Saskatchewan. Northwest Alaskan, in turn, contracted to resell 200,000 Mcf per day of this volume to Northern, a Division of Enron Corporation, 150,000 Mcf per day to Panhandle, and 450,000 Mcf per day to United. Under the Western Leg contract, Pan-Alberta agreed to sell Northwest Alaskan approximately 240,000 Mcf per day, to be delivered at a point on the border near Kingsgate, British Columbia, for resale to PIT. PIT, in turn, contracted to resell the Western Leg volumes to SoCal.

To assemble the necessary gas supply for the eastern and Western Leg sales, Pan-Alberta entered into over 800 gas purchase contracts with approximately 420 Alberta producers, who, collectively, committed over 5 Tcf of proven Alberta gas reserves to the project. In addition, Pan-Alberta contracted with NOVA for the construction of certain Prebuild-related pipeline facilities, and for the transportation of the Prebuild volumes from numerous Alberta gas fields to various interconnections with the Foothills system. Pan-Alberta also contracted with Foothills for the transportation of the gas from NOVA's facilities to the eastern and Western Leg delivery points on the U.S. border.

The Prebuild import and resale contracts were designed from the outset to provide a constant source of assured revenue from which Pan-Alberta would be provided with sufficient funds to satisfy its financial obligations to Foothills, NOVA, and the hundreds of producers whose participation was vital to the project. To this end, the gas sales contracts between Pan-Alberta and Northwest Alaskan required Northwest Alaskan to take and pay annually for 85% of the annual contract quantities, and to take and pay daily for 50% of the daily contract quantities. In addition, identical take-and-pay levels were included in the resale contracts between Northwest Alaskan and its downstream pipeline purchasers (Northern, Panhandle, United, and PIT). For all practical purposes, Northwest Alaskan's resale contracts were mirror images of its import contracts with Pan-Alberta.
B. Canadian And U.S. Prebuild Regulatory Approvals

In 1978, applications for approval of the Prebuild project were filed with the NEB in Canada and FERC in the United States. Soon thereafter, the NEB and FERC conducted extensive hearings in which every facet of the project, including the terms and conditions of the gas sales and resale contracts, was examined in detail.

Based upon the record established in these hearings, the FERC issued an order on January 11, 1980, approving the Prebuild imports and related sales and tariff arrangements for the Western Leg of the ANGTS.12 Striking a theme that would be repeated subsequently in virtually every FERC order regarding the matter, the FERC found that the Prebuild Project was not only related to the construction and initial operation of the ANGTS, within the meaning of ANGTA, but would also create substantial benefits with respect to the financing and ultimate completion of the entire system.13 Among other things, the FERC concluded that prebuilding would (1) reduce the future transportation costs of Alaskan gas; (2) get the ANGTS project started sooner than would otherwise be the case; (3) spread the demand for labor, capital, and material over a longer period; and (4) facilitate the financing of the ANGTS.14

On April 28, 1980, the FERC issued an order approving the Prebuild imports and related sales and tariff arrangements for the Eastern Leg of the ANGTS.15 Reaffirming its prior findings regarding the tangible benefits of prebuilding the Western Leg, the FERC stressed that the benefits would "be even greater with respect to prebuilding a portion of the Eastern Leg, since more of the Eastern Leg of the ANGTS is to be prebuilt ...."16
In the April 28 order, however, the FERC determined that the annual and daily minimum take provisions in the Prebuild contracts should be limited by an appropriate condition, because these provisions would otherwise constrain the ability of the U.S. purchasers to reduce their takes during periods, if any, when the gas was not priced competitively with alternate fuels. At the same time, however, the FERC recognized that a guaranteed minimum revenue stream was absolutely essential to the financing of production, plant, gathering, and pipeline facilities required for the Prebuild Project. To reconcile these dual objectives, the FERC simply required, as a condition to its import authorizations, that the minimum take provisions of the contracts be modified in a manner that would limit the financial exposure of the U.S. purchasers to a fixed amount of money per year or per day, as appropriate. Explaining this "limiting mechanism", the FERC stated:

"Rather than specify that the U.S. purchasers must take and pay for minimum quantities of gas, the Commission's alternative would specify that they would have to take and pay for enough gas to provide an assured minimum amount of revenue ....

Under this modification, the obligation of the U.S. purchasers to take gas would go down if the border price went up. However, the purchasers would always be obliged to take enough gas to provide the established minimum revenue." (emphasis added).

Significantly, the FERC went so far as to emphasize that its condition:

"... effectively assure[d] the Canadian producers of sufficient revenue to finance gathering and conditioning facilities even in the event that the delivered gas is not competitively priced." (emphasis added).

While the April 28 order was thus replete with statements that the minimum revenue stream would be assured or guaranteed, the discussion on...
tracking of project costs in the shippers' rates contained an anomalous statement which appeared to contradict the FERC's assurances. Specifically, that section of the order stated:

"... [A]n evaluation for consistency with the public interest should be made each time there is a price change for a particular source of imported gas. ... [T]he Commission would expect that different terms and conditions would be appropriate to govern a particular source of gas imports at different levels of the price for that source."

With the uncertainty created by this statement, the financial viability of the ANGTS Prebuild Project was placed in jeopardy. Moreover, without proof of financing, Foothills could not obtain the necessary authorizations from the NEB to proceed with construction of the Canadian segment of the project. On May 9, 1980, the NEB publicly announced that the uncertainty created by the FERC's April 28 order ("it could cause doubts in the perceptions of investors") precluded the NEB at that point from making the requisite findings under Condition 12 of the Northern Pipeline Act, as amended, that financing had been obtained for the Prebuild Project and could be obtained for the remainder for the ANGTS. For this reason, the NEB emphasized that it would be desirable for the FERC to reconsider the minimum payment condition of the April 28 order, particularly in light of the Canadian investments which would be required for the project.

In view of these concerns, Foothills and Pan-Alberta filed a joint petition for rehearing on May 28, 1980, urging, among other things, that the FERC renounce any right to unilaterally modify the pricing regime of the Prebuild imports on the basis of future developments. Referring to the above-quoted statement from the April 28 order, Pan-Alberta and Foothills stated:
"This perplexing statement suggests that the Commission or ERA would not only be able to modify the terms and conditions of the import permit, but, indeed, 'would expect' such modifications, each time the Canadian border price is changed – an event which could occur several times during the life of the exports. If this is the Commission’s intent, the promise of an 'assured' revenue stream is empty and without significance. What is more important, it clearly provides no basis upon which the Canadian sponsors can secure the gas supply and financing which are required for the project ..."

"To eliminate the uncertainty created by the April 28 order and to establish a proper framework for financing, the Commission’s order on rehearing should state unequivocably that neither the principles upon which the revenue ceilings are calculated, nor any other provisions which are critical to financing, will be modified during the term of the exports." (emphasis added).23

In its June 20, 1980 order on rehearing, the FERC responded favorably to the request of Foothills and Pan-Alberta, and agreed that it would be inappropriate to periodically reconsider the minimum revenue stream. Accordingly, the FERC provided:

"... the assurances sought by Foothills and Pan-Alberta that it ... [would] not change the principles upon which the revenue stream is calculated during the authorized term of the imports reaffirmed herein." (emphasis added, footnote omitted).23

In response to the apprehensions expressed by the Canadian participants, the FERC emphasized that its minimum take condition should not be viewed as a "ceiling" or a "cap" on revenues, but, rather, as "a floor, beneath which the revenues will not be allowed to fall."27 Moreover, the FERC reiterated its prior statement from the April 28 order that the condition would assure..."
sufficient revenue to the Canadian participants "even in the event that the delivered gas is not competitively priced."²⁸

With these commitments, the FERC's order of June 20, 1980 eliminated a major hurdle to the financing of the Prebuild phase of the ANGTS. However, under a proposed amendment to Condition 12 of the Northern Pipeline Act to take into account the financing of the Prebuild, construction of that segment of the overall project could not be authorized until the NEB and the Minister responsible for the Northern Pipeline Agency were satisfied that the Prebuild was financed and financing could be obtained for the remainder of the system²⁹. In short, Canada indicated that it required assurances reaffirming the commitment of the United States government to the completion of the entire ANGTS in accordance with the 1977 Agreement.

The President and Congress acted swiftly to provide the assurances required for Canadian participation in the project. Specifically, on July 1, 1980, Congress passed a Joint Resolution which reaffirmed congressional support for the ANGTS (Appendix A). After finding that prebuilding would "enable this Nation to obtain Canadian natural gas to displace two hundred thousand barrels of foreign oil per day," the Joint Resolution declared that "it is the sense of the Congress that the [ANGTS] System remains an essential part of securing this nation's energy future and, as such, enjoys the highest level of Congressional support for its expeditious construction and completion ...". Moreover, on July 18, 1980, President Carter wrote Prime Minister Trudeau a letter expressing the United States' support for prebuilding and the completion of the remainder of the ANGTS. After briefly reviewing the progress achieved in the U.S. towards completion of the ANGTS, the President stated:

"I trust these recent actions on our part provide your government with the assurances you need from us to
enable you to complete the procedures in Canada that are required before commencement of construction on the Prebuild sections of the pipeline.” (Appendix B).

Based upon the commitments of the FERC, the President, and the Congress, the NEB issued a decision in July 1980 finding that if the amended Condition 12 were approved by the Government, the NEB was satisfied its provisions could be met. With respect to the financeability of the Prebuild Project, the NEB placed great reliance on the guarantees set forth in the FERC’s June 20, 1980 order on rehearing. Specifically, the NEB noted:

"...[T]he Board was concerned whether the F.E.R.C. requirement of a minimum payment for Alberta gas transmitted on Prebuild facilities, instead of the take and pay provisions in the Pan-Alberta contract, would adversely affect the financeability of the pipeline. ... It did not incorporate the current border price for Canadian gas exports in the formula, as the Board would have preferred, but it did provide for escalation in the U.S. $3.45 price and pointed out that it was a 'floor' and in no way precluded imports at higher prices. Foothills (Yukon) has now indicated that it is satisfied with the F.E.R.C. decision .... The Board also is satisfied that the F.E.R.C. decision is not an obstacle to financing. ... [O]n the basis of the foregoing the Board ... [finds that] ... the company has established to the satisfaction of the Board that financing has been obtained for that portion of the pipeline, hereinafter referred to as the prebuild sections ...." (emphasis added).

Following the NEB's decision, the Governor-In-Council approved the amendment to Condition 12 of the Northern Pipeline Act, an amendment which was required for the Prebuild Phase to go forward. In addition, the Minister responsible for the Northern Pipeline Agency concurred with the NEB’s finding
that the financing requirements of Condition 12, as amended, had been satisfied.

C. Construction Of The Prebuild

Subsequent to the Canadian government's approval of the Prebuild Project, Foothills invested approximately one billion dollars in prebuilding 528 miles of the 2000-mile Canadian segment of the ANGTS; NOVA invested approximately $500 million in providing capacity within its intraprovincial pipeline system to transport the Prebuild volumes from numerous Alberta gas fields to interconnections with the Foothills system; and Alberta producers invested approximately $1 billion in the construction of necessary production and gathering facilities. In total, approximately $2.5 (Can.) billion was invested by the Canadian natural gas industry in order to provide a service which had been found by the FERC, the Congress, and the President to be crucially required by the public interest of the United States.

There was also substantial Prebuild investment in the United States. Specifically, Northern Border invested approximately $1.3 billion (U.S.) in the construction of 823 miles of the Eastern Leg of the Prebuild Project. In addition, PGT and Northwest Pipeline Corporation ("Northwest") invested approximately $323 million (U.S.) in the construction of the Western Leg.

Significantly, the Prebuild Phase of Foothills' system was constructed within cost estimates and was completed on schedule. As a result, deliveries began on the Western Leg in late 1981 and on the Eastern Leg in 1982.

Foothills has continued to construct additions to the Prebuild to accommodate the demand for gas in the United States. In 1993, Foothills increased capacity on the Western Leg to roughly 1.1 Bcf/d and in 1998...
expanded the Eastern Leg to approximately 2.2 Bcf/d. Both expansions were performed under the provisions of the Northern Pipeline Act, meeting all conditions under the Act including all socio-economic and environmental conditions existing at the time of the expansions. The ANGTS regime has exhibited its ability to respond to the "standards of the day".

D. Subsequent Prebuild Developments

Subsequent to its construction and placement into service, there have been numerous developments relating to the Prebuild Project. One of the most significant developments was the renegotiation of the Prebuild contracts in 1984, following the establishment of a new pricing policy by the Canadian government which granted Canadian exporters and their U.S. buyers greater freedom to agree upon the prices and other terms of their gas supply arrangements. The renegotiated contracts were designed to provide greater responsiveness to market conditions, while simultaneously preserving the minimum revenue stream which underpins the financial integrity of the Prebuild Project. These new arrangements were approved in the United States by both the Economic Regulatory Administration ("ERA") and the FERC. In both approvals, the agencies recognized the unique nature of the ANGTS and the necessity to protect the minimum revenue stream underpinning the Prebuild Project.30

These contracts have subsequently been renegotiated several times, each receiving approval in the United States. Another significant development occurred in 1989 when a multi-party settlement was consummated in order to relieve United of its contractual obligations relating to the Prebuild Project. As part of that settlement, United's equity interest in Northern Border was transferred to a subsidiary of Northern Natural; United's gas purchase obligation with Northwest Alaskan was assigned to NATGAS U.S. Inc. ("NATGAS"), a