The Scope of the Alaska Natural Gas Transportation Act and its Continuing Authority Over the Development and Certification of Initial Transportation Facilities to Transport Natural Gas From the Alaska North Slope to Markets in the Lower 48 States

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FOREWORD

The Alaskan Northwest Natural Gas Transportation Company ("ANNGTC") is the partnership which holds the Federal Energy Regulatory Commission certificate of public convenience and necessity to construct, own and operate the Alaska component of the Alaska Natural Gas Transportation System (the "Alaska Highway Project"). Foothills Pipe Lines Ltd. ("Foothills") and TransCanada PipeLines Limited ("TransCanada") are the two current partners in the ANNGTC. In addition, Foothills is the sponsor of the Canadian segment of the Alaska Highway Project, and the majority owner and operator of the Canadian portions of the Eastern and Western Legs of the Project. Foothills is jointly owned by TransCanada and Westcoast Energy Ltd.

The corporate mission of Foothills is very specific: to build and operate the Alaska Highway Project. We were leaders in the Project that was conceived twenty-five years ago, and we are just as committed to it today.

Given concerns about high energy prices and the adequacy of natural gas supplies, interest in connecting Alaskan natural gas to markets in North America is being renewed. Of course, this is not a new issue. It is an issue that has dominated energy policy debates in the United States and Canada on and off for the last quarter century. There is much history in this story. Recognition of the importance of an Alaska gas project to both countries prompted action at the highest levels of government, including (1) Congressional action, embodied in the Alaska Natural Gas Transportation Act of 1976; (2) cooperation between the United States and Canada, as embodied in the 1977 Agreement Applicable to a Northern Natural Gas Pipeline; (3) Canada's enactment of the Northern Pipeline Act; and (4) the selection of the Alaska Highway Project in 1977 as the approved Alaska natural gas transportation system under these government acts.

During the current debate, questions understandably will arise regarding the history and context of the Alaska Highway Project. To facilitate the resolution of these issues, the ANNGTC and its partners will prepare from time to time Issue Papers that address emerging questions and provide a useful context within which to conduct the public policy and commercial debates.

Attached is one such Issue Paper. Please feel free to contact us for further information and/or to discuss the contents of this or other Issue Papers.
I. Introduction and Background

The abrupt rise in the price of oil and natural gas that began in the late 1990s and intensified in 2000 and 2001 echoes the energy situation that confronted the nation in the mid-1970s. Rising natural gas prices and increased demand for limited continental natural gas supplies have sparked renewed interest in the completion of the Alaska Natural Gas Transportation System ("ANGTS"). The ANGTS was designated by President Carter in his decision as the nation's chosen instrument for facilitating the transportation of gas from Alaska's North Slope to domestic markets in the lower 48 states pursuant to unique designation procedures established in the Alaska Natural Gas Transportation Act of 1976 ("ANGTA"). Pursuant to the ANGTA, the President's choice was thereafter approved by Congress. Since then, it has never been revoked or rescinded.

Although parts of the ANGTS—the Eastern Leg, running from a point on the Canadian border near Moncy, Saskatchewan to Dwight, Illinois, and part of the Western Leg, running from the British Columbia border to California—were constructed and placed in operation, construction of the Alaska segment of the project was postponed when energy prices dropped in the late 1970s and early 1980s, rendering the Alaska portion of the project uneconomic with financing difficult to obtain. Due to the delay in construction of the Alaska segment of the ANGTS until domestic markets could support the project, it recently has been suggested that the Federal Energy Regulatory Commission ("FERC") might consider alternatives to the ANGTS under section 7 of the Natural Gas Act ("NGA"). Section 7 of the NGA generally authorizes the FERC to issue certificates of public convenience and necessity for the construction or extension of facilities for the transportation of natural gas in interstate commerce. The primary legislative purpose of ANGTA, to assure construction and initial operation of the selected transportation system, requires the conclusion that the FERC is prohibited from considering, under section 7 of the NGA, alternative systems to the ANGTS to provide for the transportation of Alaska North Slope natural gas to the lower 48 states until such time as that purpose is fulfilled.

3 15 U.S.C § 717f.
II. ANGTA Modified § 7 of the NGA

In enacting the ANGTA, Congress discarded the usual procedures of the NGA and, in their place, established a unique framework for designating and certifying a system to transport natural gas from Alaska’s North Slope to the lower 48 states. In the mid-1970s, the Federal Power Commission (“FPC”), the predecessor to the FERC, was struggling to choose, under section 7 of the NGA, the best among three mutually exclusive projects. While agreeing with the FPC that known gas reserves and anticipated market demand in the lower 48 states would support the financing and construction of only one transportation system, Congress recognized that the FPC’s complex procedures for choosing the most suitable proposal, and the likelihood of judicial challenges to the FPC’s final decision, threatened to increase the cost for, and delay the delivery of, much-needed North Slope natural gas to American consumers.

In light of the urgent need to meet demand in the lower 48 states and to blunt rising energy prices, Congress enacted the ANGTA. The ANGTA superseded the NGA process and the then-pending multiple FPC proceedings to certificate a project to transport Alaska North Slope gas to markets in the lower 48 states. Instead, it empowered the President, subject to Congressional approval, to choose a single project under the ANGTA’s unique procedures. In addition, the ANGTA set forth various requirements intended to ensure that the system selected would be completed and in initial operation before any other proposals for moving Alaska natural gas to markets in the lower 48 states could be considered under the usual provisions of the NGA.

Section 5 of the ANGTA specifically directed the FPC to suspend its pending comparative proceedings until either the President’s decision took effect following congressional approval or no such decision took effect (either because Congress withheld its approval or the President decided not to designate a system). Once Congress approved the President’s Decision, the FPC was then directed to vacate the suspended proceedings and to issue, in accordance with the President’s Decision, a certificate of public convenience and necessity for the designated system and its sponsors. Under section 5, only if the President made no designation, or if the President’s designation never became effective because it was not approved by Congress, could the certification of an initial Alaska natural gas transportation system thereafter be made under the normal NGA procedures.

The ANGTA also required expedition and precedence for processing needed permits and authorizations such as rights-of-way in order to facilitate construction and initial operation. Specifically, section 9 of the ANGTA provided that no condition in any certificate or permit related to the construction or initial operation of the approved system and no amendment or abrogation of any such term or condition could change the basic nature and general route of the approved system, or otherwise prevent or impair, in any significant respect, its expeditious construction and initial operation.
Authority of the Federal Energy Regulatory Commission to Amend the ANNGTC's Certificate of Public Convenience and Necessity

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AUTHORITY OF THE FEDERAL ENERGY REGULATORY COMMISSION TO AMEND THE ANNGTC'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

I. Introduction and Background

This paper addresses the extent to which the Federal Energy Regulatory Commission ("FERC" or "Commission") has the authority to amend the conditional certificate of public convenience and necessity authorizing the Alaskan Northwest Natural Gas Transportation Company ("ANNGTC") to construct and operate the Alaska segment of the natural gas transportation system approved by Congress under the Alaska Natural Gas Transportation Act ("ANGTA"). This paper concludes that the statute provides broad authority to add to, amend or abrogate prior decisions so long as there is not a change to the "basic nature and general route" of the system and the change does not compel a significant delay in the construction or initial operation of the system.

When Congress passed ANGTA in 1976, it recognized that the selection of a system to transport Alaska gas to the lower 48 states involves "questions of the utmost importance respecting national energy policy, international relations, national security, and economic and environmental impact . . . ."\(^2\) Because of the importance of these issues, Congress decided that they "should appropriately be addressed by the Congress and the President in addition to those Federal officers and agencies assigned functions under law pertaining to the selection, construction, and initial operation of such a system."\(^3\) The stated purpose of ANGTA is to provide the means for making a sound decision as to the selection of a transportation system for delivery of Alaska natural gas to the contiguous United States by providing for the participation of the President and the Congress in the selection process," and, if a system is approved under the Act, "to expedite its construction and initial operation . . . ."\(^4\)

II. Alcan Project Selected as the Approved Alaska Natural Gas Transportation System

A. ANGTA Section 5 and the FPC's Recommendation to the President

ANGTA established specific procedures to govern the application of the Natural Gas Act and the implementing regulations of the Federal Power Commission ("FPC") and FERC. Section 5 of ANGTA gave the FPC approximately six months to consider the competing applications for authorization to construct an Alaska gas transportation system, and to submit a recommendation to the President as to which project, if any, should be selected. Although Section 5 of ANGTA listed factors that the FPC was to consider in making its recommendation to the President, it did not prohibit changes in the project as proposed by project sponsors. ANGTA simply required the Commission to describe "the nature and the route" of the recommended project. It did not require the Commission to determine each detail of the project.

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\(^2\) ANGTA § 2(1) & (4).
\(^3\) Id.
\(^4\) ANGTA § 3.
In accordance with Section 5 of ANGTA, the FPC submitted its Recommendation to the President by letter dated May 2, 1977. The FPC also submitted an extensive report accompanying its Recommendation that compared three competing proposals: (i) a Canadian Arctic Gas overland project, (ii) an El Paso Alaska LNG project, and (iii) two alternative projects proposed by Alcan: the Alcan I 42-inch pipeline project and the Alcan II 48-inch pipeline project.

The FPC concluded that the President should select an overland route. However, it split 2-2 on which of the two proposed overland routes was superior: the Arctic Gas project (which would traverse the Mackenzie Delta in Canada, thus allowing immediate access to Mackenzie gas), or the Alcan II 48-inch pipeline project (which would provide for future access to Mackenzie gas via a separate project that would connect with the Alcan II project). The Commissioners concluded by stating: "In the absence of a Canadian determination that development and transportation of Mackenzie reserves should be permitted, the Alcan Project should be approved, subject to the Government of Canada's making the route available on acceptable terms and conditions."

While the FPC based its conclusion on "the massive record" compiled in the proceeding, none of the FPC's conclusions referenced the specifics of the projects' proposed design or required the proposed projects to remain unaltered from those initially proposed by the project sponsors. The FPC focused on the relative effects of numerous factors on the environmental and economic impact of each proposal. Moreover, in its Recommendation, the FPC expressly recognized that "final plans for design and construction are not yet developed." Accordingly, the Commission's Recommendation to the President did not foreclose an amendment to the ANNGTC's Certificate that would change the design or configuration of the Alcan project as originally proposed as long as it does not change the basic nature and general route or significantly delay expeditious construction and initial operation.

B. ANGTA Section 7 and the President's Decision

After other jurisdictional agencies submitted to the President their comments on the FPC's recommendation, Section 7(a)(1) of ANGTA gave the President three months to issue a decision as to whether a transportation system should be built and, if so, which one. If the President decided to designate a transportation system for approval by Congress, Section 7(a)(1) required the decision "to be based on his determination as to which system, if any, best serves..."
the national interest."\(^{11}\) Section 7(a)(4)(A)-(D) required the President to make four specific determinations in his decision:

- To "describe the nature and route of the system designated for approval . . . \(^{12}\);
- To "designate the person to construct and operate such a system, which person shall be the applicant . . . which filed for a certificate of public convenience and necessity to construct and operate such system . . . \(^{12}\);
- To "identify those facilities, the construction of which, and the operations, the conduct of which, shall be encompassed within the term 'construction and initial operation' for purposes of defining the scope of the directions contained in section 9 of this Act," i.e., directions to jurisdictional agencies with respect to expediting the construction and initial operation of the facilities; and
- To identify "those provisions of law . . . which provisions the President finds requires waiver pursuant to section 8(g) in order to permit expeditious construction and initial operation of the transportation system."\(^{12}\)

By letter dated September 22, 1977, President Carter forwarded to Congress his Decision and report in which he selected the Alcan project as the Alaska Natural Gas Transportation System ("ANGTS"). In the Overview to his Decision, the President recounted events that led up to his Decision, most notably, the conditional approval by Canada's National Energy Board ("NEB") of the Canadian segments of the Alcan project and the signing of the Agreement on Principles.\(^{13}\) In fact, the President incorporated the U.S.-Canada Agreement on Principles as Section 7 of his Decision.\(^{14}\) The President's conclusion more than twenty-three years ago is equally applicable today:

A superior project has now been selected as a result of a thorough decisionmaking process involving all the resources of the Federal Government and a spirited competition between private alternatives. The nation sorely needs new resources of economically competitive natural gas. Now is clearly the time to approve the decision to undertake the final planning and construction of this cost-effective system for bringing critical supplies of Alaska natural gas to U.S. markets.\(^{15}\)

\(^{11}\) ANGTA § 7(a)(1).
\(^{12}\) ANGTA §§ 7(a)(4)(A)-(D). Section 7(c) also required the President to include in his report a financial analysis of the transportation system designated for approval, for purposes of determining whether the system could be privately financed or would require Federal financing authority.
\(^{13}\) President's Decision at pp. v-vii.
\(^{14}\) The President observed that the Agreement on Principles "provides the framework for a clearly specified, economically efficient, and environmentally superior means of transporting both U.S. and Canadian gas to markets through a joint pipeline system." President's Decision at vii.
\(^{15}\) President's Decision at xiv.

1178

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Structurally, the President's Decision mirrors the structure of ANGTA itself. The first four sections of the President's Decision correspond to the four conclusions required of the President by ANGTA Sections 7(a)(4)(A)-(D).

1. Section 2 of the President's Decision: The Nature and General Route of the Approved System

To comply with Section 7(a)(4)(A) of ANGTA, Section 2 of the President's Decision described the "Nature And Route Of The Approved System." The general, two-paragraph description of the approved system in Section 2 describes the "basic nature" of the approved transportation system and the remainder of Section 2 describes the "general route" of the ANGTS for purposes of implementing the various procedures specified in Section 9 of the Act.

Section 2 described the nature of the system in two short paragraphs:

The Alcan system is an overland pipeline system to transport natural gas from the Prudhoe Bay area of Northern Alaska through Alaska and Canada into the Midwest and Western sections of the contiguous United States.

The expected volume of gas to be available initially from the Prudhoe Bay field is 2.0 to 2.5 billion cubic feet per day (bcfd). The system described herein is designed to handle this throughput volume. The capacity of the system could be increased in the future to accommodate additional volume throughput by construction of additional facilities.\(^\text{16}\)

The remainder of Section 2 described in some detail (in thirteen paragraphs and two maps) the route of the pipeline in Alaska, Canada, and the contiguous United States.\(^\text{17}\)

2. Section 3 of the President's Decision: "Identification of Facilities Included Within "Construction and Initial Operation"

Section 3 of the President's Decision is titled "Identification of Facilities Included Within "Construction and Initial Operation."" It complied with Section 7(a)(4)(C) of ANGTA, which required the President to:

... identify those facilities, the construction of which, and those operations, the conduct of which, shall be encompassed within the term "construction and initial operation" for purposes of defining the scope of the directions contained in section 9 of this Act, taking into consideration any recommendation of the Commission with respect thereto ... \(^\text{18}\)

\(^{16}\) President's Decision at 6 (reference omitted).

\(^{17}\) President's Decision at 6-11.

\(^{18}\) ANGTA § 7(a)(4)(C) (emphasis added).
The President stated that Section 3 of his Decision "identifies the facilities for the Alcan project which will be entitled to the expedited authorization process prescribed in Section 9 of ANGTA"19 for example, pipeline diameter, the length of pipeline segments, and the location and horsepower of compressor stations.

In the General Project Description subsection, the President indicated that the facilities described in Alcan's March 8, 1977 filing, as well as any modifications in those facilities required by the Agreement on Principles, would be accorded Section 9's expedited procedures. Both Alcan's March 8, 1977 filing and the Agreement on Principles recognized that significant changes would be made in the project after it was selected by the President and approved by Congress.

Thus, Section 3 of the Decision is distinguishable from the description of the "basic nature and general route" of the approved pipeline system as set forth in Section 2. Section 3 responds to the requirements of ANGTA Section 7(a)(4)(C) and identifies facilities to be afforded expedited regulatory review in accordance with Section 9 of ANGTA. Section 3 of the Decision neither dictates the design or configuration of the facilities identified therein, nor prohibits the Commission from modifying or adding additional facilities under the expedited procedures of Section 9 of ANGTA.

C. ANGTA Section 8: Congress Approves the Alcan Project

On November 2, 1977,20 Congress issued a joint resolution adopting the President's Decision and the President signed the Joint Resolution into law on November 8, 1977. Today, the Alcan project remains the "approved transportation system" for purposes of Section 9 of ANGTA.

D. ANGTA Section 9: FERC Issues Certificate

By order issued December 16, 1977, the Commission issued conditional certificates of public convenience and necessity to the project sponsors under Section 7 of the Natural Gas Act and ANGTA.21 In its order, the Commission noted that its action issuing conditional certificates under ANGTA "are ministerial actions which the Commission must perform without any exercise of administrative judgment or discretion."22 The Commission expressly noted the need for further data before it could take final action, stating, "the Alcan Pipeline Project is at too incipient a stage to warrant Commission acceptance of applications of permanent certificates of public convenience and necessity." The Commission further stated that it viewed its action "as a step which initiates the detailed process of final certification."23

The Commission expressly listed matters that would require "substantial inquiry," such as "gas reserves and deliverability, ... wellhead price ..., financial plan ..., shippers' tariffs ..."

19 President's Decision at 13.
22 Id. at 61,641.
23 Id.
III. ANGTA Section 9 and FERC Authorization to Amend the ANNGTC Certificate

Section 9 of ANGTA is addressed to all federal officers and agencies — including the FERC — that issue certificates, rights-of-way, permits, leases or other authorizations required for “the taking of any action which is necessary or related to the construction and initial operation of the approved project.” Section 9(a) directs the covered federal officers and agencies to “issue or grant such certificates . . . and other authorizations” required for the construction and initial operation of the ANGTS “at the earliest practicable date” and to the “fullest extent” permitted by law. Moreover, Section 9(b) directs the covered federal officers and agencies to expedite “all actions . . . with respect to its consideration of applications or requests” for such authorizations, giving them “precedence over any similar applications or requests . . . .”

With respect to certificates or other authorizations already issued to the ANNGTC, Section 9(d) expressly authorizes the issuing agencies or officers to “add to, amend or abrogate any term or condition included in such certificate . . . or other authorization . . . .” However, such entities including the Commission, “shall have no authority to take such action if the terms and conditions to be added, or as amended, would compel a change in the basic nature and general route of the approved transportation system or would otherwise prevent or impair in any significant respect the expeditious construction and initial operation of such transportation system,” unless such terms and conditions are required by law. (Emphasis added).

Under Section 9, therefore, the FERC must approve the ANNGTC’s Certificate amendment to the fullest extent otherwise permitted by law, must expedite any action related to the certificate amendment, and must give that action precedence over any similar application — unless such action would “compel a change in the basic nature and general route of the [ANGTS] or would otherwise prevent or impair in any significant respect the expeditious construction and initial operation of such transportation system.”

The “basic nature and general route” of the ANGTS, as that term is used in Section 9, is derived from Section 2 of the President’s Decision. As discussed in part ILB.2 above, Section 3 of the President’s Decision identified facilities included in the ANGTA term “construction and initial operation” for purposes of defining the scope of the directions contained in section 9 of ANGTA, which provisions include FERC’s powers to condition certificates (Section 9(c)) and to amend certificates (Section 9(d)). Section 2 of the President’s Decision described the “nature and route” of the approved system. It summarized the nature of the system as “an overland pipeline system to transport natural gas from the Prudhoe Bay area of Northern Alaska through Alaska and Canada into the Midwest and Western sections of the Contiguous United States.” This language describes the “basic” nature of the transportation system approved by the President.

24 Id. at 61,642 (emphasis added).
As required by ANGTA Section 7(a)(4)(C), Section 3 of the President’s Decision identified the “facilities” that “shall be encompassed within the term ‘construction and initial operation’ for purposes of defining the scope of the directions contained in Section 9” of ANGTA. (Emphasis added). Thus, Section 3 provided that the scope of Section 9’s directions to federal authorities to expedite agency action would extend to pipelines, compressors, and metering facilities, as well as the location of operating centers, staging areas, material storage sites, and transportation and communication facilities, and the other facilities described in Section 3. Neither Section 7(a)(4)(C) of ANGTA nor Section 3 of the President’s Decision restricted the Commission’s authority to consider changes to those facilities. Rather, Congress specifically defined that authority in Section 9(d) of ANGTA.

Further, when Congress approved the President’s proposed Waiver of Law in 1981 to add the gas conditioning plant to the system, it did so by approving an amendment to Section 2 of the President’s Decision, not to Section 3. In this regard, the President’s Findings and Proposed Waiver asked Congress to waive Public Law 95-158 (Congress’ 1976 Joint Resolution incorporating and approving the President’s Decision) “in the following particulars,” including “Section 2, Paragraph 3, First Sentence, of the President’s Decision, to include the gas conditioning plant in the approved transportation system and in the final certificate to be issued for the system . . . .” Section 3 was not amended to include the gas conditioning plant. The President instead left that process for the FERC to address by amendment under Section 9(d) of ANGTA.

In approving this Waiver of Law, Congress recognized the importance of the conditioning plant to the overall system. As stated in the report of one jurisdictional committee:

The Committee approves this segment of the waiver package because of the enormous size and capital cost of the facility. To withhold the gas conditioning plant from inclusion as part of the system could jeopardize the entire project. It should be noted that the granting of the waiver will make it eligible for consumer financing through the early billing commencement provisions of the waiver, for guarantees that costs will be passed through shippers to consumer[s], and for other “regulatory certainty” provisions in the waiver package.

By amending Section 2 of the President’s Decision to include the conditioning plant, Congress assured that the plant would be included in the “approved transportation system,” that is, that the plant would be included in the “basic nature and general route” of the ANGTS. Because the description of “basic nature and general route” included in Section 2 of the President’s Decision is what defines that same term as used in Section 9 of ANGTA, the inclusion of the plant in Section 2 allowed FERC to make an amendment to the certificate using Section 9(d). Moreover, the FERC’s consideration of such amendment under the expedited procedures required under

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Sections 9(a) and (b) of ANGTA would facilitate, not prevent or impair, the expeditious construction and initial operation of the project. And that is exactly what FERC did regarding the conditioning plant.

IV. Changes to the Design of ANGTS Are Authorized Under ANGTA

Section 9 of ANGTA expressly authorizes the FERC to amend the ANNGTC’s Certificate if such amendment would not compel a change in the basic nature or general route of the system as approved in Section 2 of the President’s Decision. As a general matter, the modification of facilities specifically described in Section 3 of the President’s Decision would not necessarily change the basic nature or general route of the approved system. Under ANGTA Section 9, however, the ANNGTC will have to demonstrate that the kinds of modifications that it proposes would not compel a change in the basic nature or general route of the approved pipeline system under Section 2 of the President’s Decision and would therefore be an appropriate amendment under Section 9(d).

The ANNGTC is currently evaluating technical changes to the ANGTS facilities to modernize the project to meet today’s market conditions, such as with changes to pipeline diameter and pressure from that proposed in Alcan II. Any modifications proposed by the ANNGTC will improve the economic efficiency, safety and environmental impact of the ANGTS. Such changes in the technical design of the pipeline would not amend the “basic nature” of the ANGTS described in Section 2 of the President’s Decision, i.e., an overland pipeline system that transports natural gas from Prudhoe Bay through Alaska and Canada into the Western and Midwestern sections of the United States, with sufficient capacity to handle the volumes of gas expected to be available initially from the Prudhoe Bay field, and capable of expansion to handle additional volumes. Because approval of the pipeline design and specifications proposed by the ANNGTC would not compel a change in this “basic nature” of the approved project, Section 9(d) of ANGTA would expressly authorize the Commission to amend the ANNGTC’s Certificate accordingly.27

ANGTC is mindful of the prohibition in Section 9(d) of an amendment of the Certificate that would “otherwise prevent or impair in any significant respect the expeditious construction and operation” of the ANGTS. To the extent that advanced, more efficient, and safer pipeline construction technology and operation present new opportunities which must be field tested, such testing was an integral component of the FPC’s Recommendation and the

27 As discussed in Section IV(C)(2)(b) of this memorandum, Section 10 of the Agreement on Principles provided for a bilateral technical study group to determine the appropriate diameter and pressure of the ANGTS to efficiently accommodate Mackenzie gas. The Agreement on Principles is still in effect, the Canadian and Alaskan segments addressed in Section 10 of the Agreement have not been constructed, and the development and transportation of Mackenzie reserves is still an issue of concern in Canada. It may be necessary, therefore, to convene a new study group under Section 10 of the Agreement to consider the appropriate system design necessary to “achieve safety, reliability and economic efficiency for operation of the Pipeline,” under modern technologies and operating practices. Under this approach, Section 3 of the President’s Decision expressly would include any resulting modifications in project design among the facilities covered by the expedited procedures of Section 9 of ANGTA.
President’s Decision to ensure that ANGTS would consist of modern, efficient, and safe technologies. The Commission would be authorized to consider to apply the same public interest considerations to evaluate changes in reference to today’s marketplace.

Additional changes that the ANNGTC is considering involve technical modifications of the pipeline configuration, the design of the Alaska Gas Conditioning Facility and improvements to the Net National Economic Benefit. Such changes will be proposed in a manner consistent with Section 9 of ANGTA to ensure they do not alter the basic nature and general route of the approved ANGTS project.

Changes to the technical nature of the ANGTS have been an integral part of the ANGTA process from the beginning. For example, Alcan’s March 8, 1977 filing contemplated that the original system it proposed would be changed. In addition, the Agreement on Principles contemplated changes in pipeline size and pressure and directed a technical study group to address potential modifications to the approved project. The 1981 Waiver of Law also implemented changes to the ANGTS facilities, and provides an illustrative example of the type of changes that require amending the basic nature and general route of the ANGTS.

V. Conclusion

Whether the Commission can amend the ANNGTC’s Certificate to approve the modifications in pipeline design and specifications, pipeline configuration, and conditioning plant which may be proposed by the ANNGTC under the expedited procedures required by Section 9 of ANGTA depends on whether such changes modify Section 2 of the President’s Decision and constitute changes in the “basic nature” or “general route” of the project within the meaning of Section 9.

The answer to this question is that where the project, as revised, will have the same basic nature and general route — i.e., it is still an overland pipeline system capable of transporting natural gas from Prudhoe Bay through Alaska and Canada into the Midwest and Western sections of the contiguous United States — such changes will be within the expedited review process of Section 9.

In addition, as reflected repeatedly in the FPC’s Recommendation to the President, the Agreement on Principles, and the President’s Decision, the design and configuration of the Alcan Project was far from being finalized at the time the project was approved by the President. As the example of the AGCF modifications illustrate, it is unreasonable to conclude that Congress intended to prohibit the Commission from modifying the project’s design and configuration to achieve a superior system — provided that the basic nature and general route of the system remain unchanged.

Although neither ANGTA nor the President’s Decision expressly defines the phrase “basic nature and general route” as used in Section 9, the most credible construction of Sections 2 and 3 of the President’s Decision — when read together with Sections 7 and 9 of ANGTA — concludes that the broad description of the nature and route of the ANGTS in Section 2 defines the “basic nature and general route” for purposes of Section 9 of ANGTA.
It is apparent that modifications to the design and configuration of the Alaska segment currently being contemplated by the ANNGTC are not only related, but necessary, to the construction and initial operation of the Alaska segment under modern technology, operating practices, and market conditions.

Moreover, both the U.S. and Canadian governments remain bound by the Agreement on Principles, which has the force and effect of a treaty between the two nations. The Agreement obligates both nations to take "all necessary action" to "authorize the construction and operation of the Pipeline in accordance with the principles set out" in the Agreement.\textsuperscript{28}

The Commission therefore is bound to consider any of ANNGTC's proposed modifications that are consistent with Section 2 of the President's Decision pursuant to the expedited procedures of ANGTA Section 9. In addition, to the extent necessary, the President is also bound to take "all necessary action" to enable the Commission to proceed expeditiously with the authorizations required for the completion of the ANGTS as required by the Agreement on Principles which could include a request from the President to the Congress to waive any provisions of law pursuant to Section 8(g) of ANGTA.

\textsuperscript{28} Agreement on Principles, § 1.
Foothills Pipe Lines Ltd. / Alaska Highway Gas Pipeline Project

My name is John Ellwood. I am Vice President, Engineering and Operations at Foothills Pipe Lines Ltd. ("Foothills"). We appreciate your invitation to discuss the transportation of Alaska North Slope natural gas to markets in the lower-48 states through the Alaska Natural Gas Transportation System ("Alaska Highway Project"). I understand that your committee wishes to explore with us the current status of our pipeline project with a particular focus on our permits.

Let me begin by telling you about Foothills. Our company is jointly owned by Westcoast Energy Ltd. ("Westcoast") and TransCanada PipeLines Limited. ("TransCanada"), the two major players in the Canadian gas pipeline business. Our corporate mission is very specific: to build and operate the Alaska Highway Pipeline Project. We were leaders in the project that was conceived twenty-five years ago, and we are just as committed today.

Between Westcoast and TransCanada, we have nearly 100 years of experience in developing, building and operating gas pipeline projects. We have been involved with every major Canadian gas pipeline project built in the last fifteen years.

Our existing pipeline systems provide access to five of North America's largest natural gas markets. Together, these systems have the capability to move fifteen billion cubic feet per day of gas from Western Canada to the consuming markets. Canadian gas accounts for almost 20% of all gas consumed in the United States and all of that gas currently moves through pipelines owned in whole or in part by TransCanada and Westcoast.

This map shows the existing and planned pipeline network of Westcoast and TransCanada.

TransCanada, Westcoast and Foothills have developed leading edge gas pipeline design, construction and operating technology, including expertise in dense phase designs. We are also well known for our development of environmentally sound design, construction and operation practices. We believe that our expertise in northern, remote and difficult terrain gas pipeline construction and operations is second to none.
Building and operating pipelines is our core business.

The Alaska Highway Project is the Alaskan gas pipeline project approved in accordance with the Alaska Natural Gas Transportation Act of 1976 ("ANGTA") in the U.S., the 1978 Northern Pipeline Act in Canada, and the 1977 Agreement Applicable to a Northern Natural Gas Pipeline between the two countries ("U.S./Canada Agreement"). The project is shown in black and green on this map. As approved, the Alaska Highway Project is a 4,800-mile international pipeline project commencing at Prudhoe Bay and terminating in the Midwest and California market areas. It is important to note that the southern part of this pipeline has been constructed and is in full operation. The route for this system parallels the Trans Alaska Pipeline System ("TAPS") to Fairbanks, where it angles southeast, following the Alcan Highway to the Alaska-Yukon border with Canada, down through the Yukon Territory and northern British Columbia, and into Alberta. In Alberta, the pipeline splits into two legs. The Eastern Leg proceeds southwest, crossing the U.S.-Canada border at Monchy, Saskatchewan and terminating near Chicago. The Western Leg proceeds southwest, crossing the U.S.-Canada border near Kingsgate, British Columbia and terminating at a point near San Francisco, California.

Foothills and TransCanada are the two remaining partners of the Alaska Northwest Natural Gas Transportation Company (Alaska Northwest), a partnership formed to construct and operate the Alaska portion of the Alaska Highway Project. In addition, Foothills is the Canadian sponsor of the Alaska Highway Project, and the majority owner and operator of the Canadian portions of the Eastern and Western Legs of the Alaska Highway Project.

Foothills has continuously championed the Alaska Highway Pipeline Project from the very beginning.

The Project is back “on the list” of possible solutions to the current North American concerns about high energy prices and the adequacy of natural gas supplies.
At the outset, there are some basic points that we should delineate:

- It is important to remember that this pipeline crosses the territory of two countries with different regulatory and political regimes.

- The Project has a long history, which adds unique attributes. The permits which have been issued are a product of this history and to understand the former requires an appreciation of the latter. Significantly, ANGTA in the U.S. and the Northern Pipeline Act in Canada create expedited procedures for completing the chosen system, the Alaska Highway Project.

- The pipeline permitting process can be very time consuming. In addition to the substantial work already completed on both the Alaskan and Canadian portions of the Alaska Highway Project, the special legislative and regulatory procedures in place in the U.S. and Canada will assist in expediting the construction and initial operation of the Project and keeping unnecessary delays to a minimum.

**Historical Background**

As I indicated, there are important historical dimensions associated with this project. We might focus on the time frame 1976-1982. Originally there were three competing Alaskan natural gas pipelines proposed. As shown on this map two of the projects were overland pipelines through Alaska and Canada. The third project would have transported gas by pipeline to tidewater, following the route of the “TAPS” pipeline, where the gas would be liquefied and transported to California by liquefied natural gas (“LNG”) tankers.

The U.S Congress enacted the Alaska Natural Gas Transportation Act of 1976 with a purpose to provide an expedited process with respect to the selection of a single transportation system for the delivery of Alaska natural gas to the lower forty-eight states and to expedite construction and initial operation of the chosen transportation system.

With respect to the transportation of Alaska North Slope gas to markets in the lower 48 states, ANGTA superseded the usual Natural Gas Act ("NGA")
process for granting Federal regulatory authorization to construct and operate a pipeline. ANGTA assigned the responsibility for the overall Alaska pipeline agenda to the President and Congress. Much the same approach was followed in Canada, where the Government took an active role in the decision regarding the Alaska natural gas pipeline. The reason for the creation of this extraordinary authority was that the governments wanted to expedite a cumbersome regulatory approval process in order to move more quickly to a solution.

Prior to 1978, a Canadian Board of Inquiry (The Berger Inquiry) examined a proposal to move Alaska gas across the North Slope and along the Mackenzie Valley. At the same time the National Energy Board (“NEB”) held a hearing to determine which of the two overland pipeline routes was acceptable to Canada. Both processes rejected the North Slope route (primarily for environmental reasons) and the NEB recommended the Alaska Highway (Alaska Highway Project) option, being promoted by Foothills. The Berger Inquiry recommended that no pipeline should be built along the Mackenzie Valley for at least a decade and that a pipeline across the northern Yukon should never be built.

During this same period of time the Federal Power Commission (later to become the Federal Energy Regulatory Commission (“FERC”) came to a split decision on the question of which route should be selected.

Following the enactment of the ANGTA, the President selected the Alaska Highway route and the Alaska Highway Project with his Decision and Report to Congress on the Alaska Natural Gas Transportation System (“President’s Decision” or “Decision”).

In 1977 just prior to the President issuing his Decision, the U.S. and Canada signed the U.S./Canada Agreement. This agreement or treaty, established the route, chose the companies who would build and operate the system, established tolling principles, and set the terms and principles to be followed in facilitating the construction and operation of the Alaska Highway Project pipeline. The President’s Decision reflected the U.S./Canada Agreement. The Decision and the Agreement were subsequently approved by the U.S. Congress.
In 1978 Canadian Parliament enacted the Northern Pipeline Act. The Act:

1) incorporated all of the terms of the U.S./Canada Agreement

2) issued statutory certificates of public convenience and necessity to the respective subsidiaries of Foothills Pipe Lines Ltd.,

3) created the Northern Pipeline Agency to "facilitate the efficient and expeditious planning and construction of the pipeline"

4) established the methodology and rules for setting the Canadian tolls and tariffs for the pipeline

5) selected the route for the pipeline across Canada and

6) established Terms and Conditions respecting the socio-economic, environmental, construction and operations matters.

The complete Alaska Highway Project is shown on the attached map.

The President's Decision designated Alcan Pipeline, a subsidiary of Northwest Pipeline Company (Northwest), as the party who would construct and operate the Alaska pipeline segment of the Alaska Highway Project. This authority was later assigned to Alaska Northwest, a partnership assembled by Northwest. At one time Alaska Northwest consisted of eleven (11) partners, all subsidiaries of U.S. or Canadian pipeline companies.

Given the magnitude of the pipeline undertaking Alaska Northwest sought to recruit the North Slope Producers to join the project and assist the financing of the pipeline. The Producers expressed a willingness to join but were restricted by the President's Decision that disallowed the producers taking an equity position in the pipeline. In 1981, President Reagan submitted and Congress approved a Waiver of Law package allowing producer participation and including in the project, the North Slope gas conditioning facility.

In 1980, before the Waiver of Law was passed, Alaska Northwest and the Alaska Producers entered into a Cooperation Agreement providing for joint funding of the design and engineering of the Alaska Highway pipeline and the gas conditioning facility. Following the approval of the Waiver of Law,
the scope of the Cooperation Agreement was expanded to encompass efforts to achieve the remaining regulatory approvals and to jointly pursue financing arrangements. The two sides anticipated that affiliates of the Producers would join the Alaska Northwest Partnership.

Design, engineering, environmental, financing and regulatory work proceeded along parallel tracks in Alaska and in Canada during this period of time.

As world wide energy supply and demand came back into balance and the "energy crisis" eased, the focus of the pipeline shifted to the pre-building of the southern portions of the Alaska Highway Project. There was a disagreement between Canada and the United States over this issue, primarily as it related to the export of Canadian natural gas to the U.S. market.

The Canadian Government was unwilling to authorize the Pre-build or the gas exports without further assurance from the United States that the entire Alaska Highway Project, including the Alaska segment, would eventually be completed. This assurance was forthcoming in a letter from President Carter to Prime Minister Trudeau, along with a Congressional resolution. As a result the southern Pre-build pipeline section was completed by 1982. This involved constructing 650 miles of 36 and 42 inch pipeline from Caroline, Alberta to Monchy and Kingsgate on the US border. The Pre-build and subsequent expansions were constructed pursuant to the Northern Pipeline Act and it's regulatory regime managed by the Northern Pipeline Agency.

When the Pre-build construction began it was widely anticipated that North American natural gas demand would quickly resume its upward trend. However the market did not recover as anticipated and demobilization of the Alaska Highway Project soon began.

In order to remobilize, we will be required to make modifications and enhancements to various elements of the Alaska Highway Project regime. Pipeline designs will have to be modified so that the Project can respond to capacity and gas quality requirements of the shippers. We will have to incorporate the latest technology and techniques necessary to ensure that the maximum environmental protection measures are in place. We do not expect any difficulty in introducing these revisions which are so obviously of benefit to all parties.
Recently other parties have raised issues related to payments that might be due to withdrawn partners pursuant to the Alaska Northwest Partnership Agreement. We are confident that if any return of the withdrawn partners' original investment is required it can be resolved within the context of an economically viable project.

Clearly there is a lot of work still to be done. It is very important to understand is that the advantages that come with the unique ANGTA and NPA regulatory regimes far outweigh the alternative of starting from scratch. Using the existing statutes and treaty we can assist in having Alaska natural gas into the U.S. market sooner, with competitive transportation costs and at the same time reducing project risks for all stakeholders.

In our capacity as the managing partner of Alaska Northwest we have maintained the Alaska Highway Project in good standing. We have kept the project alive to ensure that the advantages and benefits of the Project could be used in remobilization plans to expedite construction of the pipeline. We particularly wished to preserve what we see as the “special and unique fast track” regulatory regime.

Foothills and its shareholders have expended time and effort to keep the permits current and to optimize the project design. We do not intend to quit the field now that success is within sight.

The Alaska Permits – Federal

A substantial amount of work has been completed by the Alaska Highway Project sponsors to date. Before discussing the specific permits held by Alaska Northwest it is important to better understand the unique regulatory and legislative framework under which these permits were issued, namely ANGTA.

ANGTA and the President’s Decision remain in effect and can be terminated only by another act of Congress. ANGTA does not create a perpetual priority for the Alaska Highway Project. Rather, it establishes a priority designed to ensure that the Alaska Highway Project will be completed and begin initial operation in accordance with the decision of the President and
Congress. Once the Alaska Highway Project is in operation additional projects may be considered under the Natural Gas Act.

In implementing this priority, ANGTA requires that Federal agencies and officers expedite and issue “at the earliest practicable date” all permits and authorizations required by the Alaska Highway Project. In addition, ANGTA provides that applications and requests with respect to permits and authorizations required by the approved system “shall take precedence” over any similar applications and requests. Furthermore, ANGTA limits the discretion of Federal agencies and officers to include in certificates and permits for the Alaska Highway Project any conditions that would obstruct the system’s expeditious construction and initial operation.

As required by ANGTA, the FERC in 1977 expeditiously issued a conditional certificate of public convenience and necessity for the Alaska Highway Project. That certificate contains no expiration date and is still in effect today.

In addition, Alaska Northwest holds a federal right-of-way grant issued in 1980 by the Department of Interior’s Bureau of Land Management. That grant does not expire until December 2010, and may be renewed at the request of Alaska Northwest.

Furthermore, Alaska Northwest holds two recently extended Clean Water Act wetlands permits issued by the Army Corps of Engineers in coordination with many other agencies. Those permits were extended through September of 2007.

While these various federal permits were issued some time ago, they all are valid today. Indeed, nothing in ANGTA or in the certificates and authorizations issued for the Alaska Highway Project thereunder provides for the expiration of the chosen system’s priority because completion of the Alaska segment was postponed until the U.S. domestic market could support it. Rather, the Alaska portion of the Alaska Highway Project has been held in reserve until the need for additional natural gas arises in the Lower 48 states is such that this section can be completed. As sponsors we have actively protected the preserved Alaska segment by maintaining all necessary certificates and permits and actively overseeing the rights-of-way.