Cited as "1 FE Para. 70,303"

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

DOE/FE Opinion and Order No. 350-A

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

I. Background

On November 16, 1989, the Office of Fossil Energy (FE) of the Department of Energy (DOE) issued DOE/FE Opinion and Order No. 350 (Order 350).1/ Order 350 granted Yukon Pacific Corporation (Yukon Pacific) authorization under section 3 of the Natural Gas Act (NGA) to export natural gas produced in the North Slope region of Alaska to the Pacific Rim countries of Japan, South Korea, and Taiwan. Yukon Pacific plans to build the Trans-Alaska Gas System (TAGS) to deliver gas from Prudhoe Bay to Port Valdez on Alaska's southern coast, where it would be converted to liquefied natural gas (LNG) and shipped by tanker to Pacific Rim customers. On December 15, 1989, Alaskan Northwest Natural Gas Transportation Company (Alaskan Northwest) and Foothills Pipe Lines (Yukon) Ltd. (Foothills), sponsors of a competing private commercial project, the Alaska Natural Gas Transportation System (ANGTS),2/ filed individual applications for rehearing of Order 350. On the same date, Yukon Pacific filed a request for clarification.

II. Requests for Rehearing

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

process requirements in issuing Order 350; and (F) Order 350 improperly restricts the regulatory authority of the Federal Energy Regulatory Commission (FERC) and the Office of Federal Inspector (OFI) for the ANGTS.

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

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

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

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

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

> The U.S. Government has complied fully with its commitment to ANGTS by removing all regulatory impediments to the completion and operation of ANGTS by private parties [and] . . . has assured Canada that it will not erect new regulatory barriers to the completion of ANGTS by private parties.7/

Order 350 does not conflict with the continuation of this commitment in any

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

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

Moreover, Order 350 invokes the Department's plenary authority under section 3 of the NGA to include the "ANGTA condition." This condition prohibits explicitly any action in connection with the export project 9/ "that would compel a change in the basic nature and general route of [ANGTS] or otherwise prevent or impair in any significant respect the expeditious construction and initial operation of ANGTS." 10/ The DOE adopted this condition because it determined the public interest would be served by protecting the physical integrity of ANGTS. Even though the policy considerations that led the DOE to adopt this condition overlap, to some extent, those which support the ANGTA framework, neither the condition nor any other action under Order 350 was taken because of, or in violation of, some requirement or limitation in ANGTA.11/ Adoption of the "ANGTA condition" resulted from the same process by which the DOE ordinarily considers the policies that underlie various statutory frameworks, such as the antitrust laws, to the extent they are relevant to the public interest in a particular import or export application, even though the statutes impose no obligation on the DOE either to act or not act.

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

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

Intertwined with the arguments that Order 350 is inconsistent with the ANGTA framework are arguments that North Slope natural gas somehow "belongs"

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

There is no provision in ANGTA or elsewhere to support these assertions.13/ In fact, Alaskan Northwest and Foothills have cited no express guarantees or commitments with regard to North Slope reserves but rather have pleaded that a special status should be envisioned. The DOE can find no basis whatsoever for this "vision" of Alaskan Northwest and Foothills. Neither can the DOE see any special status that could be reconciled with the acknowledged fact that "producers own [North Slope] reserves and obviously they have the right to enter into contracts with whomever they please." 14/ Moreover, Alaskan Northwest and Foothills have failed to persuade the DOE that the public interest requires a change in the current unencumbered status of North Slope gas by, in effect, imposing an easement on these reserves in favor of ANGTS.15/

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

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

Closely related to the arguments that Order 350 is inconsistent with the framework of ANGTA and that North Slope natural gas belongs to the ANGTS project is the contention that Order 350 constitutes a taking of property and a violation of substantive due process.16/ Alaskan Northwest and Foothills argue that Order 350 was adopted arbitrarily and without proper consideration of their exclusive and perpetual franchise to develop North Slope gas and to deliver this gas to the lower-48 states and thus deprived them of their property rights and legitimate expectations under ANGTA. ANGTA, however, did

not grant the sponsors of ANGTS an exclusive and perpetual franchise or any other shield against competition. Accordingly the authorization of a competing project cannot be equated with either a taking or a violation of substantive due process.17/

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

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

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

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

As part of its public interest determination, the DOE weighed the effects of the export project on the environment. Order 350 took into account the Final Environmental Impact Statement (FEIS) 20/ on the export project and other environmental considerations such as the implications of the accident involving the oil tanker Exxon Valdez that occurred off Alaska after the FEIS was issued. Order 350 found that the environmental effects of the export project "are relatively minor and can be mitigated, and thus are environmentally acceptable, especially when balanced against the substantial economic benefits to be derived from the project." Order 350 requires the export project to "be implemented in accordance with all applicable environmental procedures and requirements" and to "comply with all preventive and mitigative measures imposed by Federal and State agencies to protect the public health, safety and environment." In conjunction with the issuance of Order 350, the DOE issued a Record of Decision pursuant to the regulations of the Council on Environmental Quality (40 CFR 1505.2) and the DOE's guidelines for compliance with the National Environmental Policy Act of 1969 (NEPA) which documents the manner in which DOE considered the environmental issues in its decision-making process.21/

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

The crux of Alaskan Northwest's and Foothills' domestic need argument is the reliability of resource base estimates for projecting long-term domestic supply. Foothills state that the authorization was "based on a reckless wager that so-called `potential' reserves will eventually be forthcoming and, if not, the deficiency can always be made up by foreign imports." 22/ As demonstrated in Order 350, any projection of long-term supply must incorporate the addition of reserves in the future.23/ Not recognizing this potential would be to ignore decades of historical record in which reserve additions have occurred year after year. There is nothing to suggest that this process will suddenly terminate in the near future. In addition, any decision based on the current stock of reserves alone would be distorted, if not outright absurd, since it necessarily would have to assume the U.S. will run out of natural gas before the end of the century.

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

Alaskan Northwest maintains that North Slope gas is needed domestically because supplies in the lower-48 states costing less than $3.00 per Mcf wellhead price in 1987 dollars plus potential Canadian pipeline gas and LNG imports are insufficient to meet the DOE's postulated demand of 725 quads through 2021.26/ Alaskan Northwest implies that DOE should not consider as an additional source of gas supply the 174 Tcf in the lower-48 states which the DOE/Argonne estimate indicates would be recoverable in a wellhead price range of $3.00 to $5.00 per Mcf (1987 dollars).27/ In effect, Alaskan Northwest asserts that North Slope gas must be considered "needed" because of its prediction that the ANGTS can deliver gas to the U.S./Canada border at a price of $3.00 per Mcf (1987 dollars), the sum of the wellhead price at which producers will produce and sell their gas ($0.54) 28/ and the cost of service estimate for pipeline transportation ($2.46) to the border.29/ This argument is flawed in two significant aspects.

First, this argument reduces the need analysis to predictions about the future prices of various gas supplies. The DOE does not believe need can be determined simply by comparing predicted prices, even if gas prices could be predicted precisely ten to 20 years into the future. The need analysis is primarily an assessment of whether sufficient supplies can reasonably be expected to be available to meet anticipated demand. Of course, this assessment must take into account that the costs of bringing some supplies to market may be so significantly higher than the anticipated market price that their use would be precluded in an efficient market. Alaskan Northwest and Foothills, however, have failed to demonstrate that the costs of any of the supplies considered by the DOE in Order 350, including gas producible at $3.00-$5.00 per Mcf in much more accessible areas than the North Slope, would be so high that they may not reasonably be considered available to meet anticipated demand during the term of the proposed export.

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

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

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

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

The DOE did consider these studies but did not find them convincing concerning domestic need for North Slope gas.34/ They do not conclude that this gas is needed. At most, they conclude that this gas would be available to the domestic market if the ANGTS is built. Such a conclusion necessarily flows from the standard approach used for models involving North Slope gas. Forecasters program this gas supply into the models because they assume that ANGTS will be built and therefore that North Slope gas necessarily will flow through it some day to the lower-48 states. The consumption of North Slope gas in the lower-48 states is, in effect, a foregone conclusion of these models and the only variable is the completion date of the ANGTS. As such, they reflect an assumption, and the possibility that it may be more efficient not to use North Slope gas in the domestic market is ignored. The DOE does not find the circular reasoning that relies on such studies to be enlightening when examining the domestic need for North Slope gas.

To summarize, Alaskan Northwest and Foothills have presented no new evidence or arguments that persuade the DOE to reconsider its determination that the export of North Slope gas is not inconsistent with the public interest. With respect to the environment, they provide no substantive basis to change the measures in Order 350 to protect the environment. With respect to domestic need, they give no compelling reason demonstrating that the analysis or conclusions in Order 350 were in error. Rather, they seek to confuse the possibility that North Slope gas may be consumed in the lower-48 states with a conclusion that North Slope gas is needed. The DOE's assessment

was based on the outlook for natural gas demand, the outlook for supply, the availability of energy supplies with comparable or lower costs than North Slope gas, and the likelihood that the absence of North Slope gas would result in significant distortions in the U.S. energy market. As a result of this assessment, Order 350 concluded that North Slope gas is not needed in the lower-48 states during the 25-year term of Yukon Pacific's proposed export.

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

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

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

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

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

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

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

With respect to the FERC, the DOE Act explicitly grants the Secretary of Energy all authority conferred under the NGA over imported and exported natural gas. While the Secretary has retained the policy-making aspects of

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

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

With respect to OFI, Reorganization Plan No. 1 of 1987 explicitly provides that the Federal Inspector shall follow the policies of the agency from which the enforcement function the Inspector is exercising has been transferred. Order 350 sets forth DOE's policy that the "ANGTA condition" not be used as a dilatory tactic to impede the export project. Requiring this condition to be enforced expeditiously and on the basis of facts rather than speculation does not abridge the authority of the Federal Inspector to carry out the functions of the office.40/

G. Conclusion

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

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

exports are consistent with the public interest.

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

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

III. Request for Clarification

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

The DOE's imposition of the 14 million metric ton (MMT) annual export ceiling was based on the perceived intention of Yukon Pacific to deliver only up to that volume and is reflective of Yukon Pacific's application. However, it is reasonable that Yukon Pacific be permitted to increase the quantity of LNG exported in succeeding years until it makes up any deficiency in a year in which deliveries did not equal 14 MMT, as long as the aggregate amount during the term of the authorization does not exceed 350 MMT.41/ Accordingly, we are

modifying Ordering Paragraph A of Order 350 in a manner that will give Yukon Pacific more flexibility to structure contracts tailored to the individual needs of its customers and to manage deliverability fluctuations.

IV. Decision

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

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

ORDER

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

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

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

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

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

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

Appendix

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

A. Alaskan Northwest */

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

(a) DOE's Order threatens to " . . . compel a change in the basic nature . . . of the approved transportation system or would otherwise prevent or impair in any significant respect the expeditious construction and initial operation" of the ANGTS and, accordingly, fails to comply with the mandate of section 9 of ANGTA;

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

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

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

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

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

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

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

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

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

(5) DOE has abrogated its statutory responsibilities under the National Environmental Policy Act (NEPA) by failing to consider environmental consequences associated with, inter alia, with: (1) gas conditioning arrangements for volumes proposed to be exported and (2) marine transportation hazards and interactions of LNG and oil tankers at Port Valdez and in transit through Prince William Sound.

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

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

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

B. Foothills **/

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

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

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

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

(5) DOE's approval of the proposed export is arbitrary, capricious, abusive of the government's discretion, and unsupported by either rational

findings or substantial evidence of record.

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

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

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

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

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

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

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

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

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

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

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

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

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

--Footnotes--

1/ 1 FE Para. 70,259.

2/ ANGTS is a project to deliver North Slope natural gas to markets in the lower-48 states by means of a pipeline across Alaska and Canada.

3/ 15 U.S.C. 719 et seq.

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

5/ See Alaskan Northwest's stated errors (1)(a), (1)(b), (1)(c), (2), and (6) listed in the appendix of this order; see also Foothills' stated errors (1), (2), (3), and (5)(c). The DOE notes that while Alaskan Northwest and Foothills argue the ANGTA framework somehow imposes additional or different legal requirements on the DOE when it considers the export of North Slope gas, they also take the position "that judicial review of [Order 350] must occur under Section 19 of the Natural Gas Act . . . rather than under section 10 of ANGTA." See Protective Complaint Under the Alaska Natural Gas Transportation Act Challenging Order of the Department of Energy Office of Fossil Energy filed by Foothills with the U.S. Court of Appeals for the District of Columbia on January 12, 1990. They cannot have it both ways. Since it is clear claims under ANGTA must be litigated under section 10, Alaskan Northwest and Foothills would be in an untenable position if they urged jurisdiction under section 19 of the NGA and also alleged that DOE violated ANGTA.

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

7/ See Order 350, at 33-34.

8/ Mr. McCormack forwarded this letter of January 29, 1990, to the DOE (and a letter from Ambassador Burney to him dated December 20, 1989) for inclusion in the record of this case. We have done so. In addition, W. Henson Moore, the Deputy Secretary of Energy, received a letter dated December 28, 1989, from Ambassador Burney expressing Canada's concerns about Order 350 and,

in particular, its effect on the commercial viability of ANGTS. Ambassador Burney enclosed a copy of his letter to Mr. McCormack. The DOE placed in the record the Ambassador's letter to Mr. Moore and the Deputy Secretary's reply dated January 30, 1990.

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

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

10/ Although the "ANGTA condition" repeats the language of section 9 of ANGTA, it is neither duplicative of nor mandated by the ANGTA framework since section 9 only applies to authorizations for the construction and initial operation of ANGTS. Section 9 is a statutory privilege granted the ANGTS sponsors to prevent government agencies from granting or modifying authorizations for the ANGTS in a manner that would hinder its expeditious construction and operation. Section 9 does not apply to authorizations for projects other than ANGTS.

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

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

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

14/ Id., note 81, at 39.

15/ For example, Foothills contends that if Order 350 is not rescinded, the DOE should attach a condition to the authorization "which limits the proposed exports to volumes of Alaskan gas that are demonstrated to be in excess of the proven reserves required to finance and complete the ANGTS. . . ." See Foothills' application for rehearing at 2; see also Alaskan Northwest's application for rehearing, at 6.

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

17/ See Order 350, at 39.

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

19/ See Order 350 for a discussion of DOE's findings concerning the public interest, at pages 18-30 (domestic need), 31 (American consumers), 31-32 (efficient energy production), 32 (State of Alaska), 33-35 (international effects), and 35-38 (environment).

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

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

22/ See Foothills' application for rehearing, at 11.

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

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

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

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

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

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

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

The DOE has looked at the current cost of delivering Canadian gas to Illinois and California by means of the Eastern and Western Legs of the prebuild (their present termini are in Iowa and Oregon) and the cost of delivering gas from traditional lower-48 sources. The data was derived from the Dun and Bradstreet "Official Pipeline Guide", a computerized information system for determining least-cost point-to-point U.S. pipeline transportation charges. The results show that in February 1990 gas could be delivered from the Saskachewan/Montana border via the Eastern Leg prebuild and certain

interconnecting pipelines to central Illinois (Tuscola) for $1.03/Mcf. It cost $0.60/Mcf to transport gas from the British Columbia/Idaho border via the Western Delivery System (which comprises the Western Leg prebuild) to the Arizona/California border. Much of the supply for California originates in Texas and New Mexico and production in Oklahoma and Louisiana is shipped to Illinois. Gas could be transported from west Texas and New Mexico to the southern California border for $0.27/Mcf. To transport gas from Oklahoma and south Louisiana to Tuscola would cost $0.62 and $0.46/Mcf, respectively.

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

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

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

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

33/ Id., at 39.

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

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

36/ See Order 350, at 9-11.

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

38/ See Order 350 note 18, at 7, note 32, at 16, note 34, at 17, and note 79, at 37. These footnotes detail (1) how the DOE Act granted the Secretary of Energy exclusive jurisdiction to regulate natural gas imports and exports, (2) how DOE Delegation Order No. 0204-127 delegates this broad grant of regulatory authority to the Assistant Secretary for Fossil Energy, (3) how DOE Delegation Order No. 0204-112 delegates the FERC limited authority under sections 4, 5, and 7 of the NGA to regulate natural gas imports and exports in interstate commerce, subject to the policies of the DOE and any conditions in DOE import and export authorizations, and (4) how DOE Delegation Order No. 0204-112 delegates the FERC limited authority under section 3 of the NGA to regulate export and import sites, subject to the policies of the DOE, any conditions in DOE import and export authorizations, and the veto by the DOE of a particular site. See also TransCanada Pipelines v. FERC, No. 87-1229, June 16, 1989.

39/ See Order 350, at 41-44.

40/ Id., note 83, at 41.

41/ 14 MMT x 25 years = 350 MMT.

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

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