

UNITED STATES OF AMERICA

Before The

FEDERAL POWER COMMISSION

In the Matters of :  
El Paso Alaska Company, et al : Docket Nos. CP75-96, et al  
Order Providing for Suspension : Docket No. RM77-6  
of Proceedings, et al. :  
:

PETITION FOR RECONSIDERATION

Now comes El Paso Alaska Company (hereafter "El Paso Alaska") and, pursuant to the provisions of the Alaska Natural Gas Transportation Act of 1976, Pub. L. 94-586, 90 Stat. 2903 (October 22, 1976) (hereafter generally "the Act"), the Natural Gas Act, the Administrative Procedures Act, the Regulations of this Commission as amended by Order Nos. 558 - 558-F, and basic requirements of administrative due process, moves the Commission to reconsider its Recommendation to the President, issued May 2, 1977, and issue a revised Recommendation which comports with the Act, with the evidence and with essential elements of due process. In support of this motion, El Paso Alaska submits that the Commission ignored, or gave insufficient weight to, a substantial body of evidence which would have demonstrated the superiority of the El Paso Alaska project and that, in favoring a trans-Canadian pipeline project, the Commission turned its back on concepts of administrative due process. We discuss each objection in turn.

I.

With respect to many of those matters which the Commission considered, it ignored much of the uncontroverted evidence and gave no, or insufficient, weight to much of the other evidence. This is particularly true in the areas of construction scheduling and costs, transportation costs, financing and the impact of U.S. and foreign taxes, those areas which are the lynchpin of the decision.

A. Construction Schedule and Costs

Administrative Law Judge Litt had several times found that the El Paso project could be built within the time schedule proposed by it and essentially within the dollar figures used by it. I.D. 164, 165. This Commission agreed:

". . . Judge Litt nevertheless found that the El Paso system 'can be built in the manner and in the time frames proposed.' We find no basis for reversing that finding." Recommendation VIII-25.

And:

"We believe that the El Paso cost estimates are reasonably reliable." Recommendation VIII-24.

The same findings cannot be made for either the Alcan or Arctic Gas project. Following the hearing, and with respect to the then proposed Alcan project (it underwent complete reformation following the Initial Decision), the Administrative Law Judge wrote:

"Construction is another matter. Assuming that Alcan could demonstrate that it would be

permitted to build on the Alyeska right-of-way, it could not say how close to Alyeska's line it would be permitted to come, and construction costs -- when a line cannot be specifically placed -- begin to be vague. Not that its costs elsewhere can be accepted with confidence. Its engineers are excellent; Westcoast's in particular displayed a great knowledge of their art. But, given the time constraints and magnitude of the job to be done and the vagueness of much of the specific alignment at the time their estimates were made, they were not able to support costs in more than a general way in either the U.S. or Canada. Blind faith in its engineers' expertise cannot replace the ability to independently check figures against known plans of pipeline construction on fixed rights-of-way." I.D. 345 (Footnote omitted). 1/

Thus, with respect to the then proposed Alcan project which had undergone the testing crucible of examination and cross-examination, the Administrative Law Judge was required to find that no confidence could be placed in it. This conclusion must similarly be reached with respect to Alcan's new filing -- made long after the record closed -- which no party was permitted to examine. Even as to that new project, the Commission found:

" . . . within Alaska there are unresolved issues that may lead to cost increases of the Alcan system." Recommendation VIII-34.

As an example, the Commission noted that material costs for Alcan's 48" system in Alaska are 10 percent lower than El Paso's estimate, although Alcan requires 22% more steel. Recommendation VIII-34,

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1/ One of its engineers described its costs as an "educated guess". Tr. 221/38,536 (Hauser).

fn. 84. The Commission observed:

"Whether, in the final analysis, [Alcan's] alignment will be superior in terms of costs and environmental impact to an alignment such as the El Paso base case cannot be ascertained at this time." Recommendation VIII-35 (footnote omitted).

With respect to costs, the Commission notes:

"Approximately 350 miles of the 500 miles between Prudhoe Bay and Delta Junction will require some blasting and it would appear that virtually an entire new work pad would be required in those areas.

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"Thus, questions remain as to costs of the Alcan system with an alignment near the Alyeska pipeline." Recommendation VIII-36 (footnote omitted).

Irrational distinctions on costs are noted:

"On a per foot basis, Alcan's [pipeline construction cost] estimates are \$167 in Alaska; 108.28 in Canada for the Westcoast; \$82.31 in Foothills; and \$33.13 for Alberta Gas Trunkline". Recommendation VIII-37.

The Commission then states:

". . . there is no adequate basis upon which to evaluate the reliability of costs for all portions of Canada." Id.

In construction scheduling, the Commission notes that the 16,300 employees required by the Alcan project in 1980 and the 17,358 employees required in 1981 are "far greater manpower requirements than are currently available", Recommendation VIII-41, and concludes:

". . . we cannot, on the basis of evidence available to us, accept Alcan's estimate of October 1, 1981." Id.

With respect to Arctic Gas, the Commission ignored much of the uncontroverted evidence and gave no, or insufficient, weight to much of the other evidence. This is particularly true in the areas of construction scheduling and costs. The Commission concluded that Arctic Gas had "the ability to complete its construction program in the 'manner and in the time frames proposed.'" Recommendation VII-18. Necessarily flowing from that finding was the subsidiary finding that its costs would be reasonably in line with its estimates. These findings ignore six separate risk and cost over-run analyses filed with the Commission which concluded that Arctic Gas had a substantial probability of a multi-year delay and as much as a 40% likelihood of project abandonment. With the exception of the risk and cost over-run analyses prepared for El Paso Alaska, Exhibits EP-236, 237, 255 and 267, and the "CAGPL Mainline Construction and Cost Critique" prepared by Canuck Engineering, Ltd., February 1977, for Alcan and filed with this Commission on April 8, 1977, each of the risk and cost over-run analyses were prepared by governmental agencies or parties under contract thereto. They were, however, essentially ignored by this Commission.

What do these reports say? Green Construction Company, a leading Arctic contractor, with 35 years of corporate experience in Arctic construction, Exhibit EP-236, pp. 1-6, projected a better

than 75% probability of a 1 3/4 to 2 year delay, Exhibit EP-255, pp. 14, 15, with a consequent cost over-run of \$2-1/2 billion. Exhibit EP-255, p. 35. A study prepared for the government of Canada by Fenco Consultants, Ltd., April 1977, essentially verified the results of the Green Construction Company report. A Risk Analysis prepared by the Department of the Interior showed a "high probability" of significant construction delay. Exhibit EP-231, p. 132. A similar analysis prepared by the State of Alaska reached similar results -- Exhibit EP-239. Resource Planning Associates, under contract to the Environmental Protection Agency, concluded that the Arctic Gas project had an 80 -100% probability of at least one (1) year delay, a 60 - 80% probability of more than two (2) years and a 20 - 40% probability of project abandonment. Risk Assessment, April 1, 1971, p. 12. These assessments were ignored.

Equally ignored was the substantial Canadian "native claims" problem. The Recommendation of this Commission can be read in vain to look for a discussion of the native claims of those Canadians living in the northern and western territories. Native claims in Canada impact upon financibility of both the

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2/ Although the Commission did not have the Report of the Berger Commission available to it at the time of its Recommendation, it can now take note that Justice Berger, too, had no faith in the construction plan of Arctic Gas:

"I am not persuaded that Arctic Gas can meet its construction schedule across the Northern Yukon." Berger Report, x.

trans-Canadian projects and, even assuming financibility, the construction time table. Yet, no mention of native claims appears in the Recommendation. Mr. Justice Berger's Report, on the other hand, recommends "that no pipeline be built and no energy corridor be established across the Northern Yukon", and that any "Mackenzie Valley pipeline should be postponed for ten years." Berger Report, xiii, xxvi. Daniel Johnson, Chairman of the Council for Yukon Indians, testified before the Council on Environmental Quality, May 24, 1977, pp. AM 7, AM 18-19:

"That the Council for Yukon Indians is 100% opposed to the building/construction of a pipeline until such time as our land claim has been settled and implemented and with respect to the Old Crow and North Slope areas, there shall be no pipeline in this area, forever."

"This means we are opposed to the Arctic Gas route forever and the Alcan route until after our land claims have been implemented to a reasonable degree. We estimate that this will take seven to ten years from now. Only then will we consider the Alcan route or any other route through the southern Yukon.

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"\*\*\*\* Yukon routes are not the only routes available. You have the El Paso proposal before you.

"It would provide more jobs for Americans. If environmental standards and shipbuilding requirements are very strict, then the seas will not be unduly endangered. It would not require you to depend upon a foreign country.

"We are convinced that a Yukon route would devastate the physical, social and economic environment which Yukon Indian people require. We

are not prepared to compromise our future on this issue.

"In blunt terms, Yukon Indians are suggesting to you that you have only one viable alternative -- the American route, the El Paso route. It is the only route of the three proposed which will not be totally opposed by Yukon Indians."

The impact of a 7-10 year delay would be staggering and one would have thought that, in fulfillment of its responsibility to report to the President on "construction schedules and possibilities for delay in such schedules or for delay occurring as a result of other factors",<sup>3/</sup> the Commission would have addressed itself to these problems. It did not in any meaningful way.

B. Transportation Cost

Construction costs and scheduling delays translate into transportation cost considerations. With respect to transportation costs, the Recommendation is internally inconsistent. At Recommendation IV-14, the Commission accepts Alcan's proposed cost of service, costs which are predicated upon Alcan delivering 2.4 Bcf/d by October 1, 1981.<sup>4/</sup> Yet, at Recommendation VII-39, 41, this Commission held that Alcan could not and would not meet gas deliveries by that date, and that "no decision should be

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<sup>3/</sup> Section 5(c)(7), Alaska Natural Gas Transportation Act of 1976.

<sup>4/</sup> Alcan response to cost of service data request, cover letter dated April 13, 1977.



predicated upon Alcan commencing pipeline construction prior to mid 1980." Recommendation VIII-41. There is no attempt to reconcile these two statements; the statements are, in fact, irreconcilable.

Administrative Law Judge Litt had found El Paso Alaska to be \$.55/per MMbtu more expensive than Arctic Gas. I.D. 350. Twenty-seven cents (\$.27) per MMbtu of that figure was generated by adding an extra ship and LNG train, I.D. 343, 348, and forcing El Paso Alaska into the Arctic Gas financing mold. I.D. 348. The Commission rejected both of these conclusions. Recommendation VII-26 - 32, XII-71. The Commission's figures, Recommendation IV-14, show a 20-year average difference of only \$.33/MMbtu (for Arctic Gas) and \$.30/MMbtu (for Alcan). As we have shown, however, the figures for Alcan and Arctic Gas are subject to substantial upward adjustment as cost over-runs and delays occur. This Commission obliquely recognized this fact when it observed that the advantage which Alcan and Arctic Gas now have "may be smaller than current estimates indicate due to Arctic Gas and Alcan's greater risk of cost increases over current estimates." Recommendation XII-6. But, it failed to recognize the potential magnitude of the cost increase.

In discussing the impact of potential cost overruns, the Commission was at once confusing and misleading. At Recommendation I-39, fn. 37, the Commission wrote:

"Our cost of service studies have indicated that in the unlikely event that both cost overruns of \$270 million were incurred and a one-year delay was experienced, the 20-year average cost of service would increase by only \$.09 per MMBtu."

Such a statement would suggest that the \$0.09 per MMBtu represented the transportation cost impact of both the direct cost overrun (\$270 million) and the interest penalty (an undefined amount of AFUDC) that would result from a one-year delay. But at Recommendation IV-13 the following statement appears:

"For example, even if Arctic's Alaskan construction were to require a full year longer than scheduled, with a direct cost overrun (before AFUDC) of 40 percent, their twenty-year cost of service would rise [from \$0.76] only to \$.85 per MMBtu, . . ."

Since a 40 percent overrun in Alaska Arctic amounts to \$263 million, the foregoing statement leads one to believe that an overrun expenditure on the order of \$263 million exclusive of interest penalties associated with project delays would yield a \$0.09 (\$0.85 - \$0.76) per MMBtu transportation cost impact. El Paso Alaska submits that both statements (at Recommendation I-39 and IV-13) are incorrect. Consider the following.

At the Recommendation VIII-2 the Commission states that the capital cost of the Arctic Gas project attributable to U. S. shippers amount to \$6,728.5 million. At Recommendation I-39 the Commission notes:

". . . there is a high probability that the construction costs in the northernmost

areas of that system [Arctic Gas] will increase between seven and ten percent, resulting in an overall system [direct] cost increase of less than five percent. . . .

Next we consider time delay which results in cost increases from AFUDC. . . . we find that Arctic has some probability of up to a one-year delay in the commencement of deliveries from Prudhoe Bay." (footnote omitted)

The dollar impact upon capital costs which results from the foregoing statement is \$1,157 million, calculated as follows.

Direct Cost Impact:	\$6,728.5 million x 0.05	= \$ 336 million
AFUDC Cost Impact:		
a) Debt (70%)	\$6,728.5 million x 0.7 x 0.11	= \$ 518 million
b) Equity (30%)	\$6,728.5 million x 0.3 x 0.15	= \$ <u>303 million</u>
Total Impact		\$1,157 million

In the above calculation of AFUDC on debt and equity, the interest cost and return were taken as 11 percent and 15 percent, respectively.

El Paso Alaska, therefore, submits that based upon the Commission findings, the impact of cost overruns and schedule delay of one year results in additional costs to the U. S. consumer of \$1,157 million and this translate into a 20-year average transportation cost impact of \$0.20 per MMbtu, not \$0.09 per MMbtu.

Notwithstanding this analysis, El Paso, Alaska further submits that the evidence is overwhelming that the cost overrun and delay potentials for the Arctic Gas project support a finding of total cost impacts in excess of \$2 billion.

The Green Construction Company Report, Exhibit EP-255, put the figure at \$2.6 billion. The Department of Interior in

its Report to the Congress, Exhibit EP-231, stated at page 15:

"For the Alaska-Canada system, a schedule slip from twelve to thirty-six months and a cost overrun from \$1.0 to \$3.0 billion is not unlikely."

In its March 1977 supplement, which was prepared largely to respond to Arctic Gas criticisms, the DOI notes at page 3-21:

"Finally, after reviewing all arguments presented by the applicants, coupled with the information received from arctic experts, as indicated above, it was determined by the DOI/Aerospace study team that no substantial change in the judgments presented in Reference 1 (Report to Congress) concerning schedule delays and cost overruns should be made."

In a study by Fenco Consultants, Ltd. for the government of Canada April 1977, the report at page 1.0/5 states:

"Slippage of one year could increase the cost to CAGPL by \$0.5 to \$2.0 billions in slippage costs alone . . . . This is in addition to the base cost technical overrun which, it is estimated, could be as high as \$1.2 billion for CAGPL . . . ."

While not quantifying cost impact, the risk study completed by Resource Planning Associates for the Environmental Protection Agency projected a moderate-to-high probability (60 to 80 percent) that the Arctic Gas project would experience a delay of at least two years.

El Paso Alaska submits that a realistic assessment of the Arctic Gas cost overruns and schedule delays leads to the inescapable conclusion that the Arctic Gas costs will increase by at

least \$2 billion and this translates into a 20-year average transportation cost impact of \$0.40 per MMbtu. This figure, when added to the \$0.76 per MMbtu, shown at Recommendation IV-14, results in an Arctic Gas transportation cost of \$1.16 per MMbtu, substantially higher than that shown for El Paso Alaska at Recommendation IV-14.

C. Financing

This Commission did find that El Paso Alaska was the most readily financible project:

"Given adequate identical tariff provisions, the El Paso financing plan appears to be the most feasible. In particular the anticipated availability of Title XI Federal ship financing guarantees will increase El Paso's access to loans from U.S. pension funds. Further, El Paso does not have to contend with the issue of the so-called 'Canadian Basket' under which U.S. life insurance companies are limited in their overall ability to make investment in Canadian companies. However, El Paso's greatest financing advantage may be that it would operate solely under the regulatory supervision of the United States. Operating under a single regulatory authority makes it easier to implement innovations or all events tariff concepts, which may prove to be essential in arranging a private financing." Recommendation XII-71, 75 (footnote omitted).

Although this Commission did find that the El Paso Alaska project was the most readily financible of the competing projects, it ignored much of the uncontradicted evidence with respect to the other projects. For example, it ignored, or gave insufficient weight to the uncontradicted evidence that neither

of the trans-Canadian projects could be financed and built within the same decade as a Polar Gas Project, a project which would bring substantial Canadian gas to eastern Canadian markets, and which is expected to file for certification late this year; that neither of the trans-Canadian projects could be financed until native claims had been resolved; that the financing of either of the trans-Canadian projects stretched Canadian, American and world-wide financial markets to, and perhaps beyond, their breaking points; that both of the trans-Canadian projects required governmental assistance both in Canada and in the United States, to insure financial feasibility; that, once this Commission surrendered regulatory jurisdiction over the substantial portion of either line transiting Canada, American investors would not find the trans-Canadian projects financially attractive because they could not then insure investment return.

Financially, Arctic Gas requires "a maximum effort", Exhibit EP-278, Panel 6, p. 7, in ten financial markets across the world and a commitment of the Canadian government to manage its economy for the benefit of Canadian Arctic. Exhibit AA-135, p. D-1; Tr. 112/17,828 (Hockin).

(a) Canadian Arctic must raise \$1,850 million in long-term debt from U.S. insurance companies. All the major insurance companies operate under New York Insurance Law, which restricts their investments in Canada to 10 percent of their admitted assets. Arctic Gas expects that one-half of CAGPL's requirements will not

subject to this statutory limitation because it believes it can "circumvent" the New York Insurance Law, although it has no legal opinion to support that belief and neither the New York Superintendent of Insurance nor any insurance company representative has publicly stated that the circumvention will be acceptable.<sup>5/</sup>

(b) Arctic Gas expects the appetite of U.S. insurance companies for CAGPL bonds, which they do not expect to be guaranteed as to principal and interest by any governmental entity, to be so voracious as to cause these companies (i) to take a much larger proportion of their Canadian security purchases in corporate bonds -- thereby ignoring competing government guaranteed hydro-electric issues -- than has been the historic pattern, and (ii) to increase their overall Canadian investments to much higher percentages of their assets than has been their historic pattern.

(c) Arctic Gas expects the Canadian government to enact legislation exempting CAGPL bonds from the 15 percent withholding tax in foreign investment credits.

(d) Arctic Gas expects that Canadian Arctic will sell bonds

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5/ We do not argue that Arctic Gas will fail in all 12 categories here enumerated (a-1). Rather, Arctic Gas must prove that they will succeed in all and this they cannot do.

"Arctic Gas has optimistically evaluated its supply markets, has optimistically assessed how it views its worth to the financial community, and has injected several innovative proposals, only partially tested, to spread its choices and not overburden the credibility of its suggested scheme." I.D. 378.

in the Canadian private placement market at an amount four to five times larger than ever before accomplished and without a governmental guarantee of interest and principal.

(e) Arctic Gas expects that CAGPL will be able to sell \$500 million in bonds in the Canadian public market without a guarantee of interest and principal where over \$22,085 million in bonds is offered which are guaranteed as to interest and principal.

(f) Arctic Gas expects to obtain \$1,872 million in commitments from U.S. banks despite the fact that the practical borrowing limit of the top 50 U.S. banks amounts to \$1,813 million, Exhibit AA-15, Table I, and no one could realistically expect all fifty to participate.

(g) Arctic Gas expects bank term loan maturities to be seven years after completion which would extend the maturities to 13 years on Arctic Gas' schedule and 15 years on the schedule which Green Construction Company witnesses would assign to the Arctic Gas construction schedule. These maturities are several years longer than banks have been heretofore willing to give. Exhibit EP-254, p. 19.

(h) Arctic Gas expects to obtain \$1,200-\$1,300 million in commitments from Canadian banks. That represents 92 percent to 100 percent of the capacity of the Canadian banking system. Exhibit AA-135, p. D-2; Tr. 242/42-271-2 (Dobson).

(i) Arctic Gas expects to obtain \$850 million in commitments from non-North American banks. This is 100 percent of the market



capacity and almost 200 percent greater than the largest loan made last year to a non-governmental entity by any Eurocurrency banking syndicate which did include North American banks. Tr. 242/42,276 (Clifford); Exhibit EP-254, p. 22.

(j) Arctic Gas expects to obtain \$900 million in export credits guaranteed by banks not already tapped out in the United States, Canada and the Eurocurrency markets, and to avoid with respect to these export credits any significant foreign exchange risk.

(k) Arctic Gas expects to sell \$200 million of debt to the Eurodollar market, one so volatile that no prediction can be made as to its availability. Tr. 187/31,732-3 (Katzenbach).

(l) Arctic Gas expects to be able to sell over \$700 million of CAGPL equity in Canada where over the last six years all Canadian pipelines have been able to sell in all markets -- worldwide -- only \$334 million. Exhibit AA-11; Exhibit AA-15, Appendix C, p. 7.

Thus, the Arctic Gas financial plan presses the limits of hope. So, too, does Alcan.

Unlike El Paso Alaska, which will finance solely in United States markets, the participants in the Alcan project are United States and Canadian entities which must rely upon a wide variety of markets and financing vehicles to supply their very substantial capital needs. Great dependence is placed upon the availability of capital to Canadian-based companies from private

and public Canadian markets and from that portion of the United States private market available to Canadian companies. Since these are relatively limited sources of capital, the requirement to tap these markets, year after year, raises questions about the financial feasibility of the project.

Projected funding requirements for Alcan would press the limits of the United States and Canadian private placement markets. It would do as much to the United States and Canadian banking systems, as well as the Canadian equity market. In the absence of governmental guarantees from the United States, currently uncertain as to either definition or availability, there is no proof by Alcan that adequate financing will be forthcoming. Even in markets where adequate capacity seems to exist, Alcan's cost of capital, which must ultimately be borne by the American gas consumer, would be substantially higher than the cost to an American-only project of similar credit standing. The plan involves timing and coordination among a large number of companies having various financing requirements and making competing demands in the United States and Canadian capital markets.

Finally, the competition for funds from the Maple Leaf Project would be even more intense, now that the Alcan project's external financing needs have been increased. The FPC Administrative Law Judge correctly pointed out that:

"While Alcan espoused a 13- to 22-month timing gap between projects as a minimum to avoid direct financing competition, the

investment and lending communities could well require actual Alcan operations and cash flow before the construction of Maple Leaf to avoid the aggregation of the capital requirements of the two projects. This would mean at least a 4-year timing difference." I.D. 378. 6/

In conjunction with this, it should be noted that:

"Recognition of Maple Leaf's first-born status is set forth for all to see in the agreement among the Alcan sponsors; and, even toned down as it was before the record closed, it represents an additional set of risks to the American consumer." I.D., App. I-21.

Even this Commission recognized some of the problems

Alcan faces when it wrote:

"Of the three applicants, Alcan's financing plan has been the subject of the greatest criticism. A principal attack has been that both the Alcan and Maple Leaf projects cannot be financed during the same time period, and that one or the other of the projects may have to be delayed somewhat to accomplish a successful financing. If Alcan suffers such a delay, any inflation related cost increase would have to be absorbed by U.S. consumers.

"A second basic attack on the Alcan financing plan is the proposal that U.S. shippers supply in excess of 50 percent of the equity financing for the Foothills and Alberta Gas Trunk Line segments in exchange for non-voting stock which some potential shippers consider to have a low yield. We have no intention of forcing U.S. shippers to accept such a proposal, and believe that the project sponsors must work

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6/ "In light of the close nexus between the Alcan and Maple Leaf projects and the strong possibility that both might have to be financed at the same time, there are serious doubts as to the feasibility of financing Alcan." I.D. 378.

out a satisfactory compromise if the final Alcan financing plan is to be found acceptable." Recommendation XII-75 - 76 (footnote omitted).

A fair assessment of the financing proposals of the three applicants would not simply have been that "El Paso would be the easiest system to finance." Letter to the President, 4. It would have been that neither Arctic Gas nor Alcan can be financed as presently proposed.

D. Impact of U.S. Taxes

The Commission gave insufficient weight to the fact that El Paso Alaska, in addition to generating in excess of seven hundred thousand man years of employment in the United States, would pay or cause the payment of \$9.7 billion in U.S. taxes. No other project generates that quantity of U.S. tax dollars. While we may accept the appellation "transfer payment" to describe U.S. taxes, Recommendation IV-4, we do charge the Commission with failing to recognize that the \$5640.5 million in Canadian taxes paid by Arctic and the \$3821.0 million paid by Alcan are net national deficits in substantial quantities. Why \$5.6 billion or \$3.8 billion in taxes should be paid to Canada to carry American gas to American markets has never been satisfactorily explained. And, no assumption can fairly be made as to the constancy of Canadian tax treatment.

II.

The parties to the proceeding styled El Paso Alaska Company, et al, Docket Nos. C-75-96, et al, participated in 253 days

of hearings before an Administrative Law Judge of this Commission. That Administrative Law Judge heard over 44,000 pages of testimony, received and considered hundreds of exhibits numbering thousands of pages and viewed literally hundreds of witnesses brought forward by the various parties. These proceedings were instituted and conducted in their entirety pursuant to the provisions of the Natural Gas Act and of the Administrative Procedures Act. They were comparative, adjudicatory proceedings within the meaning of Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945). All parties treated them as such, as did the Administrative Law Judge. The parties had the opportunity to examine and cross-examine evidence brought forward by proponents of competing systems. The basic notions of administrative due process were observed. While the Alaska Natural Gas Transportation Act of 1976 may have authorized suspension of the Administrative Procedures Act, it did not, and could not, suspend due process requirements. Observation of these basic due process requirements ceased, however, when the hearing process ended.

### III.

Immediately prior to and following the issuance of the Initial Decision by the Administrative Law Judge, this Commission began to issue a series of orders said to implement the Alaska Natural Gas Transportation Act of 1976. These orders are as follows:

Order No. 558, issued December 14, 1976;  
Order No. 558-A, issued December 17, 1976;  
Order No. 558-B, issued February 1, 1977;  
Order No. 558-C, issued March 11, 1977;  
Order No. 558-D, issued March 17, 1977;  
Order No. 558-E, issued March 23, 1977; and  
Order No. 558-F, issued March 31, 1977.

It was the combination of these post-hearing orders that necessarily resulted in this Commission considering three projects (El Paso Alaska, Arctic Gas and Alcan) only one of which (El Paso Alaska) has been tested by any adversary process. It also resulted in this Commission -- which held that all three projects could deliver and successfully market gas within the contiguous United States, Letter to the President, 3, and which held that the El Paso Alaska project could "deliver the gas to the contiguous United States at an economical price", Letter to the President, 2 -- favoring two projects (Arctic Gas and Alcan) which had never been tested in the crucible of examination and cross-examination. These Orders are confusing and contradictory within themselves. Order No. 558-C, for example, is wholly inconsistent with Order Nos. 558 and 558-A. Order No. 558-C had the effect of abolishing totally the basic concepts of administrative due process in that it permitted an applicant to file a whole new system, a system which in the case of Alcan, was judged acceptable by this Commission without examination and cross-examination

which necessarily inhere in any adversary system.<sup>7/</sup>

#### IV.

Pursuant to permission thus granted, Alcan submitted a totally new proposal on March 8, 1977 and supplemented that submission March 22, 1977. It was not a modification of an existing system. It was a whole new system design. A 48" O.D. express line from Prudhoe Bay to the 49th Parallel replaced a 42" line which would have carried commingled Canadian and American gas. The new system had new hydraulics, a new construction schedule, new costs, new project planning and a new route for almost 500 miles. But, Alcan offered no additional project planning evidence and no additional evidence on environmental, geotechnic or engineering considerations to show why any more credence should have been given to its 48" proposal than was previously given to its 42" proposal. Its new 48" proposal was nothing more than a concept, a concept which neither of the adverse parties was permitted effectively to examine. Notwithstanding that, this Commission did more than simply approve a concept; this Commission, in effect, stated that it could be awarded a certificate, notwithstanding that no evidence was tendered and no witnesses were examined which

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<sup>7/</sup> El Paso Alaska objected to Order No. 558-C at the time it was issued. See Motion of El Paso Alaska Company to Withdraw Order Nos. 558-C, 558-D, 558-E, and to Institute New Procedures, filed March 24, 1977. That Motion was denied by Order No. 558-F, issued March 31, 1977.

would have aided an intelligent judgment on this point.

Arctic Gas, too, filed a new construction program with this Commission. On March 22, 1977, Arctic Gas filed a whole new construction plan covering almost 2,000 miles of pipelining in Canada. Again, no opportunity was afforded to examine or cross-examine this plan, although a mere glance at the new filing revealed that all compressor stations in Alberta had been derated, that the Caroline to Coleman lateral had been re-sized from 30" to 36", that the line pressure had been decreased and that gas heater and propane refrigerants had been added. On the northern portion of the line in the Mackenzie Valley, Arctic Gas added 400 miles of above-ground transmission cable and several hundred miles of buried cable transmission lines. Over yet another 200 miles of line directly to the south, Arctic Gas proposed the installation of more than 1,000 underground support systems (VSMS) similar to those utilized above ground in the Alyeska system. The costs, hydraulics, construction manpower and construction schedule of the Arctic Gas system were obviously changed by reason of these design changes. Yet, no party was given an opportunity to examine these changes.<sup>8/</sup>

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<sup>8/</sup> These changes were said to have been required because of frost heave considerations, a construction problem which Arctic Gas, for the third time, announced they had now resolved, again. Mr. Justice Thomas R. Berger, appointed by the Government of Canada as a one-man inquiry, having heard a great deal of frost heave evidence which was cross-examined, found himself unable to conclude "that the [new] proposals made by Arctic Gas to control frost heave are sound." Berger Report, 21.



Both the new Arctic Gas proposal and the new Alcan proposal found favor with this Commission, as did the El Paso Alaska proposal. The significant difference is that only the El Paso Alaska proposal stood the test of examination and cross-examination and with respect only to the El Paso Alaska proposal was administrative due process accorded.

V.

Section 5(b)(1) of the Alaska Natural Gas Transportation Act of 1976 directed this Commission to "review all applications for the issuance of a certificate of public convenience and necessity . . . and any amendments thereto which are timely made, and after consideration of any alternative transportation system, . . . submit to the President . . . a recommendation concerning the selection of such a transportation system."

El Paso Alaska submits that the new Alcan project does not qualify within the language of Section 5(b)(1). The Alcan project was not on file at the time of the passage of the Alaska Natural Gas Transportation Act; it was not filed until months later, notably after the hearing record had been closed. It is clearly not an amendment to the original Alcan filing in any real sense of the word. It is a whole new filing; it is a whole new concept. It has new participants performing different functions. It does not propose a commingled gas stream utilizing existing Canadian lines, as did the previous filing. It proposes

a whole new system, even the size of which has been increased. It is, in short, not an amendment to the previous application but a wholly new application. Even if one were to consider it an amendment, one could not say that it had been "timely made" within the meaning of the Act. Timely filing, in any meaningful sense, must be read to mean a filing which gives the competing parties an opportunity to consider the content thereof. Thus, the Alcan proposal did not meet the test of Section 5(b)(1) of the Act and should have been rejected.

Similarly, the new Arctic Gas construction program should have been rejected. Although, as to it, we may concede that it was an amendment to an existing application within the meaning of that Act, it, too, was untimely filed. It, too, was not filed until March 22, 1977, seven weeks after the hearing record closed and barely ten days before the scheduled oral argument before this Commission. With all the time that had been devoted before this Commission to the geotechnic problem of frost heave, construction schedules and to construction manpower requirements, it would be the height of folly to suggest that any real consideration could have been given to a plan so recently filed.

Yet, both the new Alcan project and the Arctic Gas project were found acceptable. No real confidence can be placed in findings made under such circumstances.

VI.

In its precipitous rush to judgment, brought about by an unnecessarily liberal reading of the Alaska Natural Gas Transportation Act of 1976 and the consequent acceptance of two new proposals which were not subjected to the testing crucible of examination and cross-examination, this Commission has recommended to the President the construction of either of two trans-Canadian alternatives which have not been reviewed in accordance with administrative due process. See, generally, Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev., 193, 198-201 (1956).<sup>9/</sup>

El Paso Alaska submits that by so doing the Commission has deprived it of substantial rights accorded by the Alaska Natural Gas Transportation Act of 1976, the Natural Gas Act, the Administrative Procedures Act and administrative due process. More importantly, however, the President and the American people

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<sup>9/</sup> "The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance when some other interest, such as national security justifies an overriding of the interest in a fair hearing." Davis, at 199.

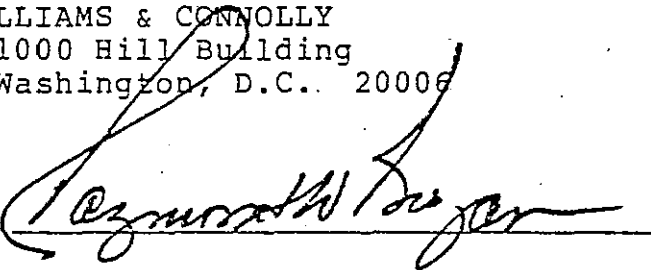
Clearly, El Paso Alaska, having expended in excess of \$20,000,000 in project planning and other expenses in anticipation of an Ashbacher-type comparative, evidentiary hearing is "a party who has a sufficient interest". In short, the rules of the game were changed in the middle of the contest. That is basically unfair.

have now been handed alternatives which have not been fully explored, alternatives which have not been adequately examined, alternatives which, for all this record shows, are nothing more than engineers' and project sponsors' dreams. Given the existing energy crisis, a crisis we are told not only will continue but will exacerbate, the President and the American people are entitled to more specificity than that. The El Paso Alaska project gives them that assurance. It is a project totally under American jurisdiction and control, a project which guarantees more than seven hundred thousand man-years of employment to this country, something neither of the other projects can do; it is a project which would be built and which would be operated completely under federal jurisdiction; and, it is a project which this Commission has found to "require the least capital", be "least vulnerable to [cost] over-runs", "the easiest system to finance", capable of delivering "gas . . . to the contiguous United States [at an economical price]" and capable of certification "in the absence of timely and acceptable agreements with the Canadian government." Letter to the President, 2, 3, 4.

In light of the foregoing, this Commission, mindful of its basic due process responsibilities to applicants appearing before it, should withdraw the Recommendation for the certification of either trans-Canadian alternative and, after consideration of the matters raised in this Petition, recommend to the President the immediate certification of the El Paso Alaska project.

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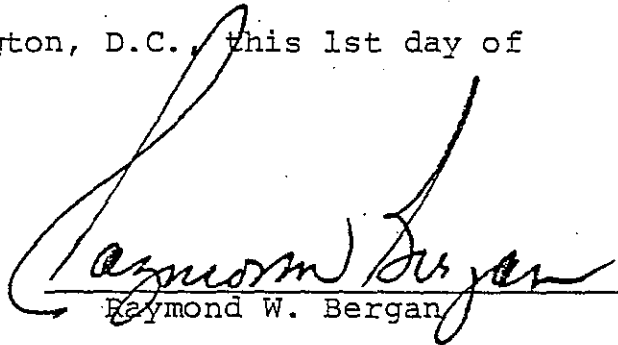
BY

  
Of Counsel to  
El Paso Alaska Company

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing Petition for Reconsideration upon each person designated on the official restricted service list compiled by the Secretary in this proceeding in accordance with the requirements of Section 1.17 of the Rules of Practice and Procedure.

Dated at Washington, D.C., this 1st day of June, 1977.

  
Raymond W. Bergan