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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

JURISDICTION

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

Yukon Pacific Corporation) Docket No. GP87-16-000

DECLARATORY ORDER

(Issued May 27, 1987)

On December 18, 1986, Yukon Pacific Corporation filed a petition for a declaratory order. Yukon Pacific has formulated a proposal to construct and operate a natural gas pipeline to transport gas from the North Slope of Alaska at Prudhoe Bay to the tidewater coast of Alaska at Valdez, for the purpose of exporting Alaskan North Slope gas to Asian markets. The pipeline, to be known as the Trans-Alaska Gas System (TAGS), would be constructed entirely in one state (Alaska), with a gas liquefaction plant at Valdez to liquefy the gas for transportation by ship to market across the Pacific.

Yukon Pacific is currently in the process of arranging financing for the project. To assist it in that effort, by narrowing the potential range of legal issues pertinent to the project, Yukon Pacific has requested a declaratory order from the Commission determining whether the Commission has jurisdiction over the project under sections 3 and/or 7 of the Natural Gas Act (NGA), 15 U.S.C. §717b and §717f.

I. The Project

In its petition (at pp. 1-3), Yukon Pacific describes TAGS as follows:

> Yukon Pacific is an investor-owned corporation organized under the laws of the State of Alaska. Its principal place of business is Anchorage, Alaska.
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> * * *
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> Yukon Pacific has been formed to construct, operate, and maintain the Trans-Alaska Gas System (TAGS). As proposed, TAGS will consist of (i) a 796.5 mile, buried, chilled, intrastate natural gas pipeline which will have a 36-inch outside diameter and is designed to transport 2.3 billion cubic feet of gas per day from the North Slope of Alaska to a tidewater site in Port Valdez, Alaska;

> (ii) ten compressor stations located along the pipeline to maintain operating pressures between 1,100 to 2,200 psig, and to maintain operating temperatures compatible with ground temperatures; (iii) a liquefied natural gas (LNG) plant designed to reduce the temperature of the gas to minus 259° fahrenheit (minus 161° centigrade), condensing it to a liquid state for storage and shipping; (iv) a marine terminal to simultaneously berth and load two LNG tankers, plus support vessels; and (v) associated LNG tankers for the export of the gas to Asian markets. The proposed TAGS Project does not currently include development of a natural gas conditioning facility on the North Slope. Responsibility for construction and operation of gas conditioning facilities, if necessary, will be the subject of future negotiations between Yukon Pacific and North Slope gas producers.
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> The TAGS pipeline, and all appurtenant facilities, will be located wholly within the state boundaries of Alaska. Moreover, all of the natural gas that flows through TAGS will be exported exclusively into foreign commerce and will not reach markets in the State of Hawaii or the lower 48 states. Yukon Pacific has not, as yet, constructed any facilities, but has applied for a federal right-of-way permit for the pipeline and marketing efforts are underway for the sale of LNG in Asia. . .

II. Interventions

Notice of Yukon Pacific's petition was issued on December 30, 1986, and was published in the Federal Register on January 7, 1987 (52 Fed. Reg. 587). Timely motions to intervene were filed by Alaskan Northwest Natural Gas Transportation Company (Alaskan Northwest), Foothills Pipe Lines (Yukon) Ltd. (Foothills), Northern Border Pipeline Company, Pacific Gas Transmission Company (PGT) and its affiliate Pacific Gas and Electric Company (PG&E) (jointly), and the State of Alaska. Yukon Pacific filed a set of answers in opposition to the motions to intervene of Alaskan Northwest, Foothills, Northern Border, and PGT and PG&E, arguing that these four intervenors have not demonstrated that they have an interest in the proceeding which may be directly affected by the outcome, or that their participation would be in the public interest.

Alaskan Northwest, Foothills, PGT and Northern Border are the project sponsors of the Alaskan Natural Gas Transportation System (the ANGTS), a pipeline system designed to transport gas from the North Slope of Alaska to the lower-48 states. Pursuant to legislation discussed below, Alaskan Northwest holds a conditional certificate to construct the segment of the ANGTS in Alaska, including a gas conditioning plant on the North Slope. That segment has not yet been constructed and is presently in abeyance. Foothills is the project sponsor of the Canadian segment. The lower portion of that segment has been constructed while the upper portion is presently in abeyance. Northern Border and PGT hold conditional certificates for the segments of the ANGTS in the lower-48 states, substantial portions of which have been constructed.

Alaskan Northwest and Foothills have submitted lengthy and detailed answers to Yukon Pacific's petition. Generally, they urge us to dismiss the petition or hold it in abeyance, on grounds that TAGS is in an early stage of development with many factual uncertainties. In the alternative, they urge us to set the matter for an evidentiary hearing. In the further alternative, they urge us to assert jurisdiction under both section 3 and section 7 of the NGA. Northern Border, in its motion to intervene, adopts by reference the views expressed by Alaskan Northwest.

Alaskan Northwest, Foothills, Northern Border and PGT, as the project sponsors of the ANGTS, clearly have an interest in the outcome of this proceeding. Moreover, in light of the Presidential and Congressional actions underlying or associated with their authority to construct and operate the ANGTS, their participation in this proceeding is clearly in the public interest. They should be accorded full opportunity to express their views, and the Commission should have the benefit of those views in considering the intricate legal issues framed by the pleadings. Accordingly, the contested motions to intervene will be granted.

The State of Alaska, in its motion to intervene, urges the Commission to grant Yukon Pacific's petition, as a means of reducing potential regulatory burdens on the proposed project. 1/

1/ In its motion to intervene, Alaska made reference to the possibility of submitting more specific comments at a later date. Counsel for Alaska subsequently advised the Commission that it did not intend to file additional comments. Alaska's timely, unopposed motion to intervene is granted by operation of Rule 214 of the Commission's procedural regulations.

Pacific Interstate Transmission Co. (PIT), Southern California Gas Co. (SoCal), Tennessee Gas Pipeline Co., a Division of Tenneco Inc. (Tennessee), and the Public Utilities Commission of the State of California (California PUC) filed motions to intervene out of time. Yukon Pacific filed short answers opposing those interventions, incorporating by reference its answer to Alaskan Northwest's intervention, discussed and resolved above. Grant of these late motions to intervene will not delay or disrupt the proceeding or prejudice any party to it. Accordingly, these motions to intervene will also be granted.

III. Is the Application Ripe?

Alaskan Northwest and Foothills point to numerous uncertainties in Yukon Pacific's application, including the identity of specific markets for the gas, the identity of specific sources of the gas to be exported, and the nature and identity of the gas conditioning facilities at the North Slope, and the relationship of all of these factors, and of TAGS generally, to the ANGTS. Yukon Pacific, on the other hand, stresses that clarification of its jurisdictional status will assist it in arranging financing, by narrowing the range of uncertainties inherent in the development of a project of this magnitude.

We note at the outset that what we have before us today is not an application for a certificate but an application for a declaratory order on our jurisdiction. Jurisdiction is a threshold question. While any determination of jurisdiction, or lack thereof, must necessarily be premised on the facts of the case, or at least on factual predicates, issuance of a declaratory order does not have either the finality or the consequences of issuance of a certificate.

If at any time facts are brought to the attention of the forum indicating that it lacks jurisdiction over a case, it must cease its proceedings and dismiss the case. Conversely, if at any time the facts indicate that the forum does have jurisdiction, prior determinations to the contrary do not relieve the forum of its statutory duty to perform its jurisdictional responsibilities. Thus, any determination we make today can only be valid within the parameters of the facts and factual predicates before us at this time. Should there be any material change in those facts, such changes could well affect our jurisdiction, necessitating further orders on the subject.

As outlined by Alaskan Northwest and Foothills in their pleadings, the TAGS project has evolved over time. Based on past experience (including the evolution of the ANGTS itself), we anticipate that the TAGS proposal may continue to evolve. From the application before us, it is indeed unclear what specific sources of gas will be exported, and to whom; Yukon Pacific has

not yet reached the stage of negotiating specific gas purchase and sales contracts. It is also not clear whether the gas conditioning plant proposed to be used by the TAGS sponsors is the same plant for which the ANGTS sponsors have already received a conditional certificate under section 7 of the NGA, or whether it is a different and totally unrelated plant. If we had jurisdiction to certificate the project, such factual uncertainties would necessarily mandate an evidentiary hearing before issuance of a certificate could be considered. We do not, however, believe that any useful purpose would be served by setting the Yukon Pacific petition for hearing at this early stage of TAGS' development when the TAGS sponsors are themselves still working out the facts pertinent to their project.

Although we are not in a position today to render a definitive determination of our jurisdiction that will be binding for all time regardless of how the TAGS project evolves, we do believe that a useful purpose would be served by outlining the potential parameters of our jurisdiction based on the facts presented in the pleadings, and based on factual predicates in those situations where the facts may change or are as yet unclear. Such a ruling will not provide the TAGS sponsors with a definitive assertion or disavowal of jurisdiction, but it may well provide a measure of guidance that will narrow the range of uncertainties and assist Yukon Pacific in further formulation of its project. It may also facilitate and expedite regulatory review of the project as it ripens, by clarifying the role of the Commission in the enviromental review processes.

IV. The Relationship of TAGS to the ANGTS

Yukon Pacific, in its application, asks us in effect to analyze our jurisdiction over TAGS as a project standing alone, by itself, unrelated to any other project in Alaska. Further, the only statute that Yukon Pacific has asked us to address in determining our jurisdiction over TAGS is the Natural Gas Act. Alaskan Northwest and Foothills, on the other hand, cite and discuss at length the unique legal history of the ANGTS, and contend, in effect, that our determinations with respect to TAGS must be made in the context of the ANGTS legal framework. In order to consider those arguments, we start by briefly outlining some of the legal enactments pertinent to the ANGTS.

Pursuant to section 7 of the Alaska Natural Gas Transportation Act of 1976 (ANGTA), 2/ President Carter issued his Decision and Report to Congress on the Alaska Natural Gas Transportation System

2/ 15 U.S.C. § 719 et. seq.

(President's Decision), 3/ designating the route and project sponsors for the ANGTS, and Congress approved those determinations by Joint Resolution. 4/ Subsequently, pursuant to section 8(g) of ANGTA, President Reagan submitted a Waiver of certain provisions of law (President's Waiver of Law), 5/ in an effort to assist the financing and construction of the ANGTS, and that Waiver was also approved by Joint Resolution of Congress. 6/

Section 9 of ANGTA mandates that all federal agencies having jurisdiction over the ANGTS expedite their regulatory activities with respect to it. Section 9 also prohibits such agencies from changing "the basic nature and general route of the approved transportation system" [i.e., the ANGTS], or taking other regulatory action that "would otherwise prevent or impair in any significant respect the expeditious construction and initial operation of such transportation system."

Reorganization Plan No. 1 of 1979, which was submitted by the President to the Congress and not disapproved by the Congress, established the Office of the Federal Inspector, which reports directly to the President. The Inspector is responsible for monitoring the construction of the ANGTS, and for coordinating all federal permitting and certification of it. The Plan transferred to the Inspector the Commission's NGA section 3 and 7 jurisdiction to enforce the Commission's certificates and import authorizations issued to the ANGTS project sponsors.

The ANGTS is also governed by two international agreements with Canada, both of which have the force and effect of law. The "Agreement Between the Goverment of the United States of America

3/ Executive Office of the President, Energy Policy and Planning, September 1977. See Midwestern Gas Transportation Co. v. F.E.R.C., 589 F.2d 603 (D.C. Cir. 1978).

4/ H.R.J. Res. 621, Pub. L. No. 95-158, 91 Stat. 1268, 95th Cong., 1st Sess. (1977).

5/ Findings and Proposed Waiver of Law, October 15, 1981, reprinted at H.R. Rep. No. 350, 97th Cong., 1st Sess. 25 (1981).

6/ S.J. Res. 115, Pub. L. 97-93, 95 Stat. 1204 (1981). See Metzenbaum v. F.E.R.C., 675 F.2d 1282 (D.C. Cir. 1982).

and the Government of Canada Concerning Transit Pipelines," 7/ entered in force October 1, 1977 after ratification by the Senate, applies to all pipelines in both countries whenever one country's pipeline carries the other country's gas or oil. The treaty mandates non-discriminatory treatment. The "Agreement Between the United States of America and Canada on Principles Applicable to a Northern Natural Gas Pipeline" (Agreement on Principles), signed by representatives of the two governments on September 20, 1977, is an executive agreement that was made part of the President's Decision (pages 47-83). Inasmuch as the Decision was approved by Congress, it (including the Agreement) has the legal status of a statute. The Agreement specifies the route of the ANGTS, and contains numerous conditions.

Prior to Canada's issuance of regulatory approval for the early construction ("prebuild") of the lower portion of the Canadian segment of the ANGTS, the Congress, in a Concurrent Resolution adopted June 27, 1980, reaffirmed the U.S. commitment to construct the ANGTS. 8/ The ANGTS has also been a subject of correspondence and assurances between the President of the U.S. and the Prime Minister of Canada. 9/

The parties have also drawn our attention to several provisions of U.S. law that are pertinent to the export of natural gas from Alaska. Pursuant to section 3 of the NGA and applicable delegations by the Secretary of Energy (discussed below), the Administrator of the Department of Energy's Economic Regulatory Administration (ERA) has jurisdiction to approve or disapprove the export of Alaskan gas transported by TAGS. In addition, section 12 of ANGTA provides as follows:

> Sec. 12. Any exports of Alaska natural gas shall be subject to the requirements of the Natural Gas Act and section 103 of the Energy Policy and Conservation Act, except that in addition to the requirements of such Acts, before any Alaska natural gas in excess of 1,000 Mcf per day may be exported to any nation other than Canada or Mexico, the President must make and publish an express finding that such exports will not diminish the total quantity or quality nor increase the total price of energy available to the United States.

7/ 28 U.S.T. 7449, T.I.A.S. No. 8720.

8/ S. Con. Res. 104, 96th Cong., 2nd Sess. (1980).

9/ See, e.g., Appendices B, D and E of Foothills' Answer.

Section 103 of the Energy Policy and Conservation Act, cited above in section 12 of ANGTA, also provides for findings by the President with respect to certain exports of natural gas.

Finally, we note that section 109(a)(4) of the Natural Gas Policy Act of 1978 establishes the maximum lawful price for "natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976." With respect to that gas, as so defined, section 208 of the NGPA requires rolled-in pricing under certain circumstances.

Alaskan Northwest and Foothills cite various combinations of these legal provisions in support of their arguments. They contend, for instance, that the North Slope gas to be exported through TAGS has in some meaningful way, either as a matter of law or national policy, been committed or otherwise earmarked for transportation through the ANGTS; that there is only enough gas to support one project; and that TAGS is therefore competitive with the ANGTS. 10/ They also suggest that, under certain circumstances, the northern segment of TAGS might be usable as the first leg of the Alaskan segment of the ANGTS; that Yukon Pacific may be intending to utilize the North Slope gas conditioning plant that Alaskan Northwest holds a conditional certificate to construct and operate as part of the ANGTS; and that the gas might eventually be transported by Yukon Pacific not to Asia but to an LNG terminal on the west coast of the lower-48 states. The overall thrust of their arguments, when woven together, is to the effect that any action by this Commission that serves to expedite, clarify or facilitate the development of TAGS would, to that extent, impair the expeditious construction of the ANGTS, and alter its nature and route, in contravention of the legislation mandating construction of the ANGTS as a vehicle to transport the North Slope gas to market. Alaskan Northwest goes so far as to suggest (quoting Congressional testimony of a former General Counsel of the Department of Energy)

10/ For instance, Alaskan Northwest discusses at some length a 1985 decision of the Federal Inspector denying Yukon Pacific's appeal from an adverse ruling on a Freedom of Information Act request. Yukon Pacific had sought access to ANGTS engineering and design data. In denying the request, the Federal Inspector held that Yukon Pacific is a "competitor" of Alaskan Northwest, and that release of the information would cause "substantial competitive injury" to Alaskan Northwest. See Alaskan Northwest's Answer at 35-36.

that Alaskan North Slope gas cannot be exported absent new legislation in Congress. 11/ Foothills suggests a potential violation of the 1977 Agreement on Principles between the U.S. and Canada. 12/

These arguments pose an obvious dilemma for the Commission. Yukon Pacific has asked only for a declaration of the Commission's jurisdiction under the Natural Gas Act. The issues raised by the intervenors range far beyond the Natural Gas Act, into international agreements and statutory mandates involving other federal officials and agencies (and even potential future legislation). The primary responsibility for interpreting and implementing those other legal and policy mandates resides not in the Commission but in the President, the Congress, the Secretary of State, the Secretary of Energy (and his delegatee, the Administator of ERA), and the Federal Inspector. It would be inappropriate for the Commission to attempt to anticipate what decisions these duly authorized persons and entities might make in the future on matters for which they bear the prime responsibility. 13/

On the other hand, the Commission cannot approach this case in a total vacuum as if the ANGTS and all of its legal mandate didn't exist. In its orders on the ANGTS and related matters, the Commission has always taken into account the mandate of all legal matters relevant to the case before it, including international agreements and other international assurances. 14/

Faced with these various considerations, the Commission concludes as follows. All of the parties agree that, at a minimum, Yukon Pacific will need to obtain statutory approval for its

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11/ Alaskan Northwest's Answer at 38.

12/ Foothills' Answer at 19-20.

13/ Certainly there is an issue as to whether ANGTA and its several legal and diplomatic progeny can be interpreted to preclude authority under the NGA to authorize a project other than the ANGTS for transportation of Alaskan natural gas. Given the complexity of statutory interpretation and the subsequent legal, diplomatic and resulting policy implication of any such legal interpretation, the Commission has decided to defer any attempt to render an opinion on this subject until the President and the Secretary of Energy have the opportunity to address the issue in the context of a formal application to export the Alaskan natural gas.

14/ See, e.g., Order No. 380-A, Elimination of Variable costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, FERC Statutes & Regulations ¶ 30,584 (1984) at 31,062.

export of the gas from both the President and the Administrator of ERA. We believe it reasonable to assume that other federal officials and agencies with related responsibilities will have an appropriate opportunity to express their views as they pertain to the decision on that fundamental threshold question. To the extent that the Commission has jurisdiction over TAGS under the Natural Gas Act (as discussed below), it would be inappropriate in any event to render any substantive decisions with respect to TAGS pursuant to that jurisdiction unless, and until such time as, all relevant federal officials and agencies had authorized exportation of the gas to be transported through TAGS. At that time, we would have the benefit of the views and decisions of the President, the Department of Energy, and other federal officials with respect to many of the issues raised by Alaskan Northwest and Foothills. And we would, of course, have full opportunity to weigh and consider those issues at that time to the full extent that they have a bearing on whatever substantive decisions are then pending before the Commission.

Thus, at this time, we decline to address any issues beyond the narrow question of jurisdiction under sections 3 and 7 of the Natural Gas Act. 15/ In doing so, we specifically recognize that the issues raised by Alaskan Northwest and Foothills exist, are very important, and have a significant (indeed, fundamental) bearing on the project. We make no assumptions at this time as to how those issues will ultimately be resolved, when, or by whom. For purposes of addressing the narrow, Natural Gas Act questions posed to us, we will proceed as follows: If the responsible federal agencies and officials were to approve the export, what jurisdiction would the Commission then have over TAGS under sections 3 and 7 of the NGA.

V. Factual Predicates

A. The Gas Conditioning Plant

In its petition, Yukon Pacific states that:

> The proposed TAGS Project does not currently include development of a natural gas conditioning facility on the North Slope. Responsibility for construction and operation of gas conditioning facilities, if necessary, will be the subject of future negotiations between Yukon Pacific and North Slope gas producers. 16/

15/ As discussed below, we will also address the independent but related issue of the scope of Executive Order No. 10485, as amended.

16/ Petition at 3.

Alaskan Northwest points out that the President's Waiver of Law, supra, designated the Alaska Gas Conditioning Facility (AGCF) as part of the ANGTS, to be included in any final certificate issued by the Commission for the Alaskan segment of the ANGTS. Thereafter, the Commission issued an order amending Alaskan Northwest's conditional certificate so as to include the AGCF in it. 17/ No final certificate has been issued, and the AGCF has not been constructed.

In its Answer, Alaskan Northwest quotes from, analyzes, and discusses at length the application, as amended, that Yukon Pacific filed with the U.S. Department of the Interior's Bureau of Land Management for a federal right-of-way permit to cross federal lands in Alaska. Alaskan Northwest concludes that a gas conditioning plant will be needed in order to chill the gas (for transmission through an underground TAGS pipeline traversing permafrost areas of Alaska), to compress the gas to a high pressure, and to remove impurities and carbon dioxide. Alaskan Northwest next concludes that Yukon Pacific intends to use Alaskan Northwest's own AGCF for this purpose. Finally, Alaskan Northwest contends that Yukon Pacific and TAGS might become subject to NGA section 7 jurisdiction if Yukon Pacific becomes a joint owner of the AGCF or if Yukon Pacific's gas is commingled in the AGCF with Alaskan Northwest's gas. 18/

The Commission will not address this particular question in a hypothetical and speculative fact context. There is nothing in Yukon Pacific's petition per se to indicate that Yukon Pacific intends to either use or partially purchase Alaskan Northwest's conditionally certificated AGCF. We will proceed on the factual predicate that if a conditioning plant is needed at the North Slope for conditioning gas for TAGS, it will be a conditioning plant that is owned and operated by someone other than Alaskan Northwest, and that such plant will not be owned and operated pursuant to a section 7 certificate as part of the Alaskan segment of the ANGTS.

Our discussion of section 7 jurisdiction below is predicated, in part, on this factual assumption. If Yukon Pacific subsequentl

17/ Alaskan Northwest Natural Gas Transportation Co., 18 FERC ¶ 61,002 (1982).

18/ Alaskan Northwest's Answer at 14, 19-22, and 32-34; see also Foothills' Answer at 13, and 22-23.

decides to utilize Alaskan Northwest's conditionally certificated AGCF, the matter of section 7 jurisdiction would have to be reexamined in the context of those facts.

B. Potential Changes in TAGS' Configuration

Alaskan Northwest and Foothills trace the development of the TAGS project, presenting evidence that at earlier stages of this development the TAGS sponsors seriously considered various other proposals. One possibility considered was a pipeline in which the upper segment, from Prudhoe Bay to Fairbanks, would be 48 inches in diameter while the lower section, from Fairbanks to tidewater, would be 36 inches in diameter. The upper segment would then be usable as the first leg of the ANGTS. 19/ Another possibility that the sponsors may have considered would involve delivering some or all of the gas to LNG terminals on the west coast of the lower-48 states. Citing the absence of contracts for the sale of the gas to specific buyers in Asia, Alaskan Northwest and Foothills suggest that Yukon Pacific might revert to one or the other, or similar, modifications of its project as it develops in the future. 20/

Again, we will not speculate as to how Yukon Pacific may or may not revise its plans in the future. Our discussion of section 7 jurisdiction below is predicated on the facts stated in Yukon Pacific's application - a pipeline of constant, 36 inch diameter that runs from the North Slope to tidewater, entirely within the State of Alaska, unconnected to any other pipeline, not usable as part of the ANGTS, and with all of the gas transported for export across the Pacific to foreign countries with-

19/ See, e.g., the letter from Mr. Walter J. Hickel, Yukon Pacific Corporation, to former Chairman Raymond J. O'Connor of the Commission, December 8, 1983, at p. 3. The authorized diameter of the Alaskan segment of the ANGTS is 48 inches. Alaskan Northwest Natural Gas Transportation Company, Order Approving Alaskan Segment Design Specifications and Initial System Capacity, 8 FERC ¶ 61,129 (1979); Order Denying Petitions to Vacate Order on Alaskan Segment Design Specifications and Initial System Capacity, 9 FERC ¶ 61,046 (1979).

20/ See Alaskan Northwest's Answer at 15-19; Foothills' Answer at 21-22, and 24.

out entering any other state of the U.S. If in the course of developing its project Yukon Pacific departs from these facts, the Commission will reexamine the matter to determine whether and how such changes affect the Commission's jurisdiction over TAGS.

C. The Source of TAGS' Gas

As discussed above, this order makes no attempt to determine the legal status of the natural gas on the North Slope. Such determinations have an obvious bearing on what gas, if any, is available for export, which in turn could have a fundamental impact on the feasibility of the project. The discussion of jurisdiction below is predicated on the factual assumption that whatever gas TAGS transports would be gas determined by the appropriate federal authorities to be legally eligible for export via TAGS. In other words, if Yukon Pacific obtains all of the requisite federal approval to export gas produced on the North Slope of Alaska, what jurisdiction would the Commission then have under sections 3 and 7 of the Natural Gas Act over a TAGS pipeline that is configured pursuant to the factual predicates discussed above? That is the question we now address.

VI. Section 7 of the Natural Gas Act

Based on all of the factual predicates discussed above, the Commission would not have jurisdiction under section 7 of the Natural Gas Act.

Section 7 confers jurisdiction over the transportation, and the sale for resale, of natural gas in interstate commerce, and the construction and operation of facilities for that purpose. Section 7 refers to transportation and sales "subject to the jurisdiction of the Commission." Section 1(b) defines that jurisdiction in terms of transportation and sales "in interstate commerce." Section 2(7) defines "interstate commerce" as

> commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

The courts have consistently construed these provisions to mean that the sale or transportation of natural gas between one state and a foreign country does not constitute "interstate commerce" within the meaning of the NGA. Border Pipeline Co. v. F.P.C., 171 F.2d 149 (D.C. Cir. 1948); Distrigas Corp. v. F.P.C., 495 F.2d 1057, 1065 (D.C. Cir. 1974), cert. denied, 419 U.S. 834 (1974).

The facts upon which this declaratory order is predicated are that TAGS will begin and end in one state -- Alaska -- and never leave that state during the course of its journey from Prudhoe Bay to Valdez, and that the gas will then cross the Pacific to its market. On these facts, the transportation and sale of the gas clearly does not occur in interstate commerce within the meaning of the NGA. Accordingly, the construction and operation of TAGS does not facilitate transportation or sales in interstate commerce. Therefore, such construction and operation falls beyond the ambit of section 7 of the NGA. We stress, again, that this conclusion is premised on all of the factual predicates discussed above, including the facts regarding the conditioning plant, the configuration of the pipeline, and the sources of the gas.

VII. Section 3 of the Natural Gas Act

Section 3 of the Natural Gas Act requires prior authorization before exporting natural gas from the U.S. In 1977, the Department of Energy Organization Act transferred this function to the Secretary of Energy. 21/ In a series of delegation orders, the Secretary has delegated and assigned that function to the Administrator of ERA and to the Commission. Under the most recent, and presently applicable, delegation orders, the Administrator of the ERA has jurisiction to approve all aspects of the export except those aspects that involve the siting, construction and operation of new pipeline facilities. These new facilities aspects are delegated and assigned to the Commission.

Pursuant to Department of Energy Delegation Order No. 0104-111, effective February 23, 1984, 22/ the Secretary of Energy delegated to the Administrator of the Department's Economic Regulatory Administration the authority under section 3 of the NGA "to regulate . . . exports of natural gas." In paragraph (a) of Delegation Order No. 0204-112, issued on the same date, 23/ the Secretary delegated to the Federal Energy Regulatory Commission the authority to approve or disapprove "the place of . . . exit for exports" of natural gas whenever the export involves "the construction of new domestic facilities" (although reserving in the first instance the authority of the Administrator to disapprove

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21/ See sections 301(b), 402(a) and 402(f) of the Department of Energy Organization Act, 42 U.S.C. § 7151(b), § 7172(a) and § 7172(f).

22/ 49 Fed. Reg. 6684.

23/ Id.

any such place of export). The delegation orders also reserve to the Commission the authority to approve or disapprove "the construction and operation of particular facilities" necessary to implement the export, to the extent that such construction and operation falls within the jurisdictional ambit of the Natural Gas Act.

In light of this allocation of authority in the Secretary's delegation orders, the Commission clearly has jurisdiction under section 3 of the NGA to approve or disapprove (to the extent not previously disapproved by the Administrator) the place of export of the natural gas transported by TAGS. Such jurisdiction is independent of any additional jurisdiction the Commission may have (discussed below) to approve or disapprove the siting, construction and operation of new gas pipeline facilities necessary to implement the export.

In order to be able to export the gas, Yukon Pacific must first construct a large diameter pipeline that will traverse approximately 800 miles of territory, much of it wilderness in nature, with a gas liquefaction plant at its tidewater terminus. The construction of an 800 mile pipeline through wilderness areas, and the construction of a liquefaction plant, constitutes a major action significantly affecting the quality of the human environment. The National Environmental Policy Act of 1969 (NEPA) requires that an environmental impact statement (EIS) be prepared, and the Department of the Interior, in fact, is currently preparing an EIS for the project. The approval of a place at which the gas is authorized to be exported is clearly a federal action. Thus, in exercising its own statutory responsibilities under section 3 of the NGA, the Commission will also need to comply with NEPA, with access to an appropriate EIS. The Commission will consider the environmental ramifications of its decision in light of the analysis in the EIS before approving the place of export of the North Slope gas to be transported by TAGS.

We turn now to the matter of the siting, construction and operation of facilities. In Distrigas Corp. v. F.P.C., supra, 495 F.2d at 1064, the court held that "[u]nder Section 3, the Commission's authority over imports of natural gas is at once plenary and elastic," and that to prevent gaps in jurisdiction the Commission has the discretion under section 3 "to impose on imports of natural gas the equivalent of Section 7 certification requirements." Prior to the issuance of the present delegation orders, the Administrator of the ERA had occasion to exercise this function with respect to a gasification plant on the coast of California to be used in the importation of natural gas from

Indonesia for consumption entirely in California. 24/ Subsequent to the issuance of delegation orders transferring this function to the Commission, 25/ the Commission itself has had occasion to exercise jurisdiction -- under section 3 of the NGA by analogy to section 7, but not pursuant to section 7 -- over the continued operation of facilities used to import, reexport, and reimport gas from Canada that travels from Canada to Minnesota, back into Canada, and then back into Minnesota for consumption entirely within Canada and Minnesota. 26/ The Commission has also exercised that section 3 authority to approve the construction and operation of a very short pipeline under the Rio Grande to export gas from Texas to a town in Mexico. 27/

24/ Pac Indonesia LNG Company and Western LNG Terminal Associates, 1 ERA ¶ 70,101 (1979) at 70,511.

25/ The present delegation orders provide that authority as follows. Paragraph (d) of DOE Delegation Order No. 0204-111, the delegation to the Administrator of ERA, specifically excludes from ERA's jurisdiction "authority to approve the construction and operation of particular facilities . . . ." Inasmuch as the order itself delegates solely "authority under Section 3 of the NGA . . . ." it is clear that the exclusion in paragraph (d) encompasses section 3 authority to regulate the operation of facilities. Paragraph (a) of DOE Delegation Order No. 0204-112, the delegation to the Commission, contains the mirror image. It delegates to the Commission "the authority to perform the following functions with respect to the imports and exports of natural gas: (a) Approval or disapproval of the construction and operation of particular facilities." Inasmuch as paragraph (b) delegates to the Commission "[a]ll functions under Sections 4, 5 and 7 of the NGA," it is clear that paragraph (a) is intended to encompass authority to approve or disapprove the operation of particular facilities under section 3 of the Act; otherwise, paragraph (a) would serve no useful purpose and would be totally redundant to paragraph (b).

26/ Inter-City Minnesota Pipelines Ltd., 29 FERC ¶ 61,150 (1984). In that case, which involved facilities to import gas, with rate impacts on U.S. ratepayers, the Commission acted to close a regulatory gap.

27/ Valero Transmission Co. and Valero Industrial Gas Co., 27 FERC ¶ 61,151 (1984) and 30 FERC ¶ 61,035 (1985).

On the facts before us today, the Commission declines to exercise any discretionary authority it may have under section 3 of the NGA to regulate the siting, construction and operation of the TAGS pipeline. In the instance of an export of gas, unlike an import, there are no economic consequences to U.S. ratepayers. The cost of the project, and the risks inherent in it, will be borne (in whatever fashion) by the project sponsors, its lenders and investors, and its foreign purchasers of the gas. Thus, with respect to economic issues, there is no regulatory gap.

With respect to physical impacts, as noted above the decision to approve or disapprove the place of export will require access to an EIS. The EIS process will afford the Commission ample opportunity to consider the environmental and safety aspects of the pipeline and its liquefaction plant. If necessary, appropriate conditions could be attached to the authorization of the place of export to satisfy any concerns we may perceive with respect to safety and the environment. Accordingly, based on the factual predicates set forth above, at this time we see no need to assert discretionary jurisdiction under section 3 beyond the jurisdiction we already have under section 3 to approve or disapprove the place of export. We stress, however, that this determination is subject to reconsideration in the event of any changes in the facts upon which it is premised.

VIII. Executive Order No. 10485

Executive Order No. 10485, as amended 28/ and as delegated to the Commission by the Secretary of Energy, provides for the approval by the Commission of the construction and operation of gas pipeline facilities at the border of the U.S. and another country. In doing so, the Commission must first obtain the views of the Secretaries of State and Defense. The Federal Power Commission, pursuant to an opinion rendered by the Office of the Legal Counsel of the Department of Justice, determined that Executive Order No. 10485 does not apply to gas facilities on the border of the U.S. and international waters. Phillips Petroleum Company and Marathon Oil Company, 37 F.P.C. 777 (1967). Inasmuch as the TAGS project does not involve the construction or operation of any gas pipeline facilities at the border of the U.S. and another country, but only involves the construction of facilities at tidewater, Executive Order No. 10485 is clearly inapplicable.

28/ Exec. Order No. 10485, 18 Fed. Reg. 5397 (1953), as amended by Exec. Order No. 12038, 43 Fed. Reg. 4957 (1978).

This should end the discussion. In its petition, however, Yukon Pacific confuses Executive Order No. 10485 with section 3 of the NGA, contending that section 3 is "conditioned" by the executive order. The matter is further confused by Yukon Pacific's assertion that the Secretary of Energy's delegation of authority to approve the place of export of the gas was pursuant to section 7 of the executive order and not pursuant to section 3, that the executive order does not contain authority "to approve or disapprove the construction, operation siting and place of exit for exports of natural gas," and therefore that the Secretary's delegation and assignment of this authority in DOE Delegation Order No. 0204-112 "is merely an ultra vires act of the Secretary of Energy and is without force of law." 29/

We will dispel the confusion. Section 3 and Executive Order No. 10485 are totally independent sources of legal authority. They do not (indeed, can not) "condition" or implement each other. Section 3 of the NGA is a grant of authority from the Congress to the Federal Power Commission, subsequently transferred to the Secretary of Energy and, in turn, partially delegated by the Secretary to the Federal Energy Regulatory Commission. The Commission's authority, delegated to it by the Secretary, to regulate the place of export of the gas (and, in the Distrigas situation, to regulate the siting, construction and operation of facilities) derives from section 3 of the NGA, not from Executive Order No. 10485. Nothing in Executive Order No. 10485, as amended, purports to modify or restrict in any way the Secretary's or the Commission's authority under section 3 of the NGA.

Executive Order No. 10485 is a legal provision wholly independent from the NGA that imposes additional distinct requirements. When gas pipeline facilities are to be constructed at the border of the U.S. and a foreign country, considerations of foreign policy and national security are involved. Accordingly, the executive order requires that the Secretaries of State and Defense address these considerations. These requirements are in addition to the public interest requirements set forth in section 3 of the NGA with respect to the import and export per se. The President's authority to issue Executive Order No. 10485 does not derive from the NGA; on the contrary, it is an independent exercise of the President's executive powers under Article II of the Constitution to conduct foreign relations, and as Commander-in-Chief of the armed forces of the U.S. 30/

29/ Petition at 5-16; emphasis is in the petition.

30/ U.S. Const. Art. II, § 2, cl. 1 and cl. 2.

The separate and distinct character of section 3 of the NGA vis-a-vis Executive Order No. 10485 is illustrated by the Phillips Petroleum and Marathon Oil order, supra, relied upon by Yukon Pacific in its petition. The sponsors of that project filed separate applications, in separate dockets, for (1) authority under section 3 of the NGA to export specified volumes of natural gas from facilities in the Cook Inlet Basin area of Alaska, and (2) authority under Executive Order No. 10485 to construct and operate such facilities at the U.S. border. The Federal Power Commission's order granted the authority under section 3 to export the gas from and to the places described in that application, while dismissing the application for a border facilities permit. In the same manner, in the case at bar the Commission has jurisdiction under section 3 of the Natural Gas Act, as delegated by the Secretary of Energy, to approve the place of export of the gas to be exported.

The Commission orders:

(A) The motions to intervene filed by Alaskan Northwest, Foothills, PGT and PG&E, Northern Border, PIT, SoCal, Tennessee, and the California PUC are granted.

(B) The Commission's determination of its jurisdiction, and the factual predicates upon which it is based, are set forth above in the text of this order.

By the Commission.

(S E A L)

Kenneth F. Plumb

Kenneth F. Plumb,
Secretary.