

**UNITED STATES SENATE COMMITTEE ON ENERGY
AND NATURAL RESOURCES**



ALASKA NATURAL GAS TRANSPORTATION ACT

Staff Report of the Federal Energy Regulatory Commission

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Table of Contents

Page

EXECUTIVE SUMMARY	1
I. BACKGROUND	3
II. POTENTIAL LEGAL ISSUES ARISING UNDER ANGTA	6
A. <u>The Current Applicability of ANGTA</u>	7
B. <u>Vitality of the Commission's 1977 Findings</u>	8
C. <u>Authority to Deviate from the President's Decision</u>	9
D. <u>Commission Flexibility with Respect to Alternative Proposals</u>	11
E. <u>Environmental Issues</u>	12
F. <u>Enforcement Authority under ANGTA</u>	13
G. <u>Transportation within the United States</u>	14
H. <u>Issuance of a Final Certificate</u>	14
I. <u>International Considerations</u>	15
APPENDIX: LEGAL AND HISTORICAL BACKGROUND	16
A. ANGTA	18
B. The Commission's Recommendation to the President	19
C. International Agreements	20
1. The Transit Pipeline Treaty	21
2. The Agreement on Principles	21
D. The President's Decision	22

Table of Contents

Page

E. Congressional Approval 24

F. Subsequent Commission Actions 24

G. Presidential Waivers 26

H. Office of the Federal Inspector 27

I. Judicial Review 29

EXECUTIVE SUMMARY

Due to projected long-term increases in demand for natural gas, there is a resurgence of interest in developing a natural gas transportation system for delivering Arctic natural gas to markets in the lower 48 states. Under the Natural Gas Act (NGA) a pipeline proposal to move Arctic natural gas will require regulatory approval by the Federal Energy Regulatory Commission (Commission). A number of alternative routes and methods of getting natural gas from the Arctic Region to U.S. markets are currently being considered by the natural gas industry, including a revised version of the Alaska Natural Gas Transportation System (ANGTS), which was initially approved in the late 1970s, pursuant to the Alaska Natural Gas Transportation Act (ANGTA). That legislation was designed to expedite the certification process that would otherwise have been conducted under the NGA.

On September 14, 2000, the United States Senate Committee on Energy and Natural Resources held an Oversight Hearing to Consider the Transportation of Alaska North Slope Natural Gas to Market and to Investigate the Cost, Environmental Impacts and Energy Security Implications to Alaska and the Rest of the Nation for Alternative Routes and Projects. At that hearing, Commission Chairman James J. Hoecker stated that he had instructed a Commission staff team to review the history of the ANGTA proceedings, and to examine their applicability and effect on potential proposals for pipelines to move Arctic natural gas to United States markets. This report sets forth the Commission staff's findings.¹

What issues arise, and how the Commission addresses them, will depend on the nature of any application filed with the Commission. However, a number of threshold legal issues will likely need to be resolved in order to determine the regulatory framework governing the processing of any such proposals. First, the question of whether, and to what extent, ANGTA controls the development and approval of any and

¹This report has been prepared by the Commission's Office of the General Counsel. The analyses and conclusions herein are those of the study team and do not necessarily reflect the views of any individual Commissioner, or the Commission itself.

all proposals to transport Arctic natural gas must be answered. In other words, depending on the nature of the application filed, parties to a new proceeding might be expected to ask whether ANGTS is the exclusive project for moving Arctic natural gas, or whether alternative or separate proposals could be considered under ANGTA or under the NGA? Second, the Commission will probably have to decide the extent to which it can authorize an ANGTS proposal that varies from that already approved by the Commission, the President, and Congress. This report seeks to identify and discuss these and other issues that may confront pipeline applicants and the Commission² as they develop and act on proposals to move Arctic natural gas to markets in the lower 48 states.

There are no simple answers to many of the legal questions posed herein. This is in great measure because applicants and the Commission will be dealing with circumstances that were likely not contemplated when ANGTA was drafted, including changes in the energy market, in pipeline construction technology, and in environmental regulation and, most notably, the fact that, some 25 years after the enactment of ANGTA, the pipeline project for which ANGTA provided expedited treatment has not been built. Moreover, many of the key terms of ANGTA (such the "the basic nature and general route" of an ANGTS) are terms of art specific to that statute which have never been construed by the Commission or the courts. Neither the legislative history of ANGTA nor the limited case law thereunder provides significant guidance as to how to deal with an ANGTS proposal under current circumstances. However, it does not appear that ANGTA would adversely affect consideration by the Commission of a proposal to transport Arctic natural gas made solely under the NGA.

The report will begin with an overview of the history of ANGTA and the ANGTS. (An appendix to the report will provide a more detailed discussion of these matters.) The report will then outline legal issues that may arise under ANGTA, the NGA, the National Environmental Policy Act (NEPA), and other relevant statutes if an application for an Alaska natural gas transportation proposal is filed.

²The "Commission" when used in the context of an action taken prior to October 1, 1977, refers to the Federal Power Commission (FPC); when used otherwise, the reference is to the Federal Energy Regulatory Commission (FERC).

I. BACKGROUND

During the 1970's, the United States was confronted with energy shortages, including insufficient natural gas supplies to meet rising demand. As energy producers sought ways to bring new supplies to market, three separate proposals were filed with the Commission, under the Natural Gas Act (NGA), seeking authorization to construct and operate natural gas transportation projects to bring to the lower 48 states the immense supplies of gas that had been discovered on Alaska's North Slope. The Commission set these competing applications for hearing.

In October of 1976, upon finding that the national interest called for the expeditious construction of a viable natural gas transportation system for delivery of Alaska natural gas to markets in the lower 48 states, Congress enacted the Alaska Natural Gas Transportation Act (ANGTA or the Act). 15 U.S.C. § 719. The purpose of ANGTA was "to provide the means for making a sound decision as to the selection of a transportation system for delivery of Alaskan natural gas for construction and initial operation by providing for the participation of the President and the Congress in the selection process, and if such system is approved under this chapter, to expedite its construction."³ Congress established this unique selection process recognizing that the issues involved in this decision-making process included questions on national energy policy, international relations and economic and environmental impacts that were beyond the expertise of the various agencies who would have responsibility over discrete aspects of the permitting process for this system. As a result, the Act established a decision-making process involving administrative, executive and congressional participation.

In accordance with the procedures established under ANGTA, the Commission halted its hearings in December 1976, and instead prepared a "Recommendation to the President," in which it recommended equally two overland gas pipeline proposals that would travel, via different routes, through Alaska and Canada to the contiguous United States. The President, in turn, selected one of the two pipelines (hereinafter referred to as "ANGTS"). The President's Decision was thereafter approved by Congress on November 8, 1977.⁴

ANGTA establishes the primary framework for the Commission, and other Federal agencies, to review and approve an ANGTS. However, ANGTA supplements, but does

³15 U.S.C. § 719a.

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

not supersede the NGA, and the Commission's responsibilities thereunder. Thus, ANGTA creates a process whereby an ANGTS may be recommended and, by consolidating federal actions and limiting judicial review, expedites final approval of an ANGTS. However, ANGTA contemplates that the Commission will review and approve an ANGTS pursuant to the NGA, which provides that no natural gas company shall construct or operate facilities for the transportation or sale of natural gas unless the Commission has issued it a certificate of public convenience and necessity and has established NGA rates. Thus, the Commission exercises authority with regard to an ANGTS under both ANGTA and the NGA.

Because of Congress' interest in expediting the construction and operation of an ANGTS, ANGTA contains a number of provisions that restrict the exercise of administrative and judicial authority. These include limits on judicial review (15 U.S.C. § 719h(b)), the presumed conclusiveness of the environmental impact statements prepared in the ANGTS process (15 U.S.C. § 719h(c)), limits on the ability of Federal and state authorities and other persons to comment on an ANGTS (15 U.S.C. § 719d(a) and (b)), and restrictions on the ability of Federal authorities to impose conditions on ANGTS (15 U.S.C. § 719g(c) and (d)).

As an international project, the ANGTS is also governed by two international agreements between the United States with Canada, both of which have the force and effect of law. The first is the Agreement Between the Government of the United States of America and the Government of Canada Concerning Transit Pipelines (Transit Pipeline Treaty).⁵ The Transit Pipeline Treaty applies to all pipelines in both countries whenever one country's pipeline carries the other country's gas or oil. This treaty mandates nondiscriminatory treatment. The second is the Agreement between the United States of America and Canada on Principles Applicable to a Northern Natural Gas Pipeline (Agreement on Principles),⁶ an executive agreement that specifies the route of the ANGTS and contains numerous conditions. The Agreement on Principles was made a part of the President's Decision, and since the President's Decision was approved by Congress, it has the legal status of a statute.

The President took additional actions under ANGTA. The Act provides that the President can submit to Congress proposed waivers of law in order to permit the expeditious construction and initial operation of an ANGTS. 15 U.S.C. §§ 719e(4) and

⁵The Transit Pipeline Treaty was entered in force October 1, 1922, after ratification by the Senate.

⁶The Agreement on Principles was signed September 20, 1977.

f(g). As part of his Decision, President Carter submitted a waiver of provisions relating to the importation of natural gas. In 1981, President Reagan submitted an additional waiver, dealing with technical aspects of President Carter's Decision, as well as certain portions of the NGA and the Energy Policy and Conservation Act. Both of these waivers were approved by Congress. Also, by Reorganization Plan No. 1 of 1979, the President established the Office of the Federal Inspector for the Alaska Natural Gas Transportation System (OFI), and transferred to OFI Federal functions with respect to pre-construction, construction, and initial operation of the ANGTS. OFI was subsequently abolished, and its functions transferred to the Secretary of Energy. See Pub. L. 102-486 (1992).

The United States' portion of the ANGTS is comprised of three segments: (1) the Alaska segment, running from Prudhoe Bay on the Alaskan North Slope to the Yukon border; (2) the Western Leg, running from the British Columbia border to California; and (3) the Eastern Leg (Northern Border Pipeline), running from a point on the Canadian border near, Moncy, Saskatchewan, to Dwight, Illinois. Originally, the ANGTS was scheduled to be completed by January 1, 1983.⁷ The Commission issued a conditional certificate to all sponsors for all three segments of the ANGTS in December 1977, as mandated by ANGTA.⁸ However, to date, only the Eastern Leg and a portion of the Western Leg have been constructed and placed in operation.⁹ Totalling approximately 1,512 miles, these two "pre-build" segments represent about 32 percent of the total transportation system selected pursuant to ANGTA. Construction of the Alaskan segment, far and away the costliest of the three segments, never began. Under the terms of the selection decision, the ANGTS was to be privately financed and securing the financing for the Alaskan segment proved difficult due to changes in the energy market, including short-term world excess energy supplies, depressed oil prices and uncertainties in world financial markets. Consequently, the project sponsor, Alaskan Northwest Natural Gas Transportation Company (Alaskan Northwest), was forced to move back the construction completion dates several times. Finally, in May 1982, the Commission's

⁷See, for example, section 7.3 of the Agreement between the United States of America and Canada on Principles Applicable to a Northern Natural Gas Pipeline, which sets out a timetable for completion of the various segments between January 1, 1980 to January 1, 1983.

⁸Alcan Pipeline Company, et al., 1 FERC ¶ 61,248 (1977).

⁹See Northwest Alaskan Pipeline Co., 10 FERC ¶ 61,032 (issuing certificates for western leg facilities), supplemental order and order on hearing, 11 FERC ¶ 61,279 (1980); Northwest Alaska Pipeline Co., 11 FERC ¶ 61,088 (issuing certificates for eastern leg facilities), supplemental order, 11 FERC ¶ 61,301 (1980).

certificate proceedings pertaining to the Alaskan segment were held in abeyance because of the financing difficulties.¹⁰ At that time, much regulatory work had been done toward issuing a final certificate to Alaskan Northwest for the Alaskan segment.¹¹ However, nothing of substance has been done to move this project forward since May 1982.

A more detailed review of legal and historical background of these matters is attached as an appendix.

II. POTENTIAL LEGAL ISSUES ARISING UNDER ANGTA

Should the Commission be faced with new or revised proposals to certificate one or more projects to transport natural gas from Alaska (possibly including a revised ANGTS project), parties to the proceedings may raise a number of issues related for the most part to ANGTA. Given that no such proposal has yet been filed, the Commission cannot predict what the key issues will be, or what aspects of ANGTA may come into question. Particular issues may or not may arise, depending on whether a proposal is filed under ANGTA or the NGA, or how closely an ANGTS proposal mirrors the President's Decision and previous Commission orders. However, certain issues that appear relatively likely to be posed are outlined below, beginning with general matters and moving to the more specific.

It is also possible that an application for a proposal to transport Arctic natural gas could be filed solely under the NGA. In such a case, the Commission would determine, as required by Section 7 of the NGA, whether the proposed project was in the public convenience and necessity.¹² While, as noted below, ANGTA did require the Commission to suspend (and ultimately vacate) its then-current competitive proceedings regarding Arctic natural gas transportation proposals and to give precedence to consideration of an ANGTS that was approved by the President and Congress, the act does not bar proposals that might compete with an ANGTS (indeed, requiring that

¹⁰See Northwest Alaskan Pipeline Co., et al., 19 FERC ¶ 61,068 (1982).

¹¹The last action in this regard was Order No. 320, which established conditions for tracking costs relating to the Alaskan segment. See Northwest Alaskan Pipeline Co., et al., 24 FERC ¶ 61,122 (1983).

¹²As discussed herein, it is possible that a proposal filed under ANGTA might benefit from the provisions of that statute that were intended to expedite consideration of an ANGTS, including those limiting environmental and judicial review. A proposal filed solely under the NGA would not be subject to those provisions.

precedence be given to consideration of an ANGTS strongly indicates acceptance of the possibility of competing projects). Moreover, by disposing of the competitive proceedings and by issuing a conditional certificate to the ANGTS, it would appear that the Commission satisfied the "precedence" requirement of ANGTA. Thus, ANGTA would not appear to be a bar to any proposals made under the NGA.

A. The Current Applicability of ANGTA

In 1977, the Commission issued a conditional certificate for the Alaskan portion of the ANGTS, pending the filing by the ANGTS sponsors of a full application, and Commission action thereon. To date, although the "pre-build" legs of ANGTS have long since been constructed and placed in operation, final Commission authorization of the Alaska portion of the system has not been sought.

ANGTA was passed twenty-four years ago, in response to the significant natural gas shortages of the late 1970s. Congress' initial finding in ANGTA is that "a natural gas supply shortage exists in the contiguous States of the United States." 15 U.S.C. § 719. The stated purpose of ANGTA is, if a transportation system for delivering Alaska natural gas to the contiguous states is selected, "to expedite its construction and initial operation." 15 U.S.C. § 719a. To deal with the urgent need for additional energy supply, Congress established special procedures, and modified certain aspects of the regulatory process, such as streamlining environmental review, consolidating certain Federal authorities that would otherwise be exercised by various executive branch departments and agencies, curtailing the opportunity for competition in transporting Alaska natural gas supplies, and sharply limiting judicial review. These facts give rise to the following issues.

- By its terms, ANGTA continues to apply; the statute contains no sunset provision. However, circumstances have changed greatly since ANGTA was enacted. There was a serious natural gas shortage in the 1970s. Energy markets and theories of regulation have changed significantly since then, with increased focus on open markets and competition. In light of these developments, it may be questioned whether it was Congress' intent in passing ANGTA to extend the benefits of that legislation, such as the limits on judicial review and environmental analysis, to a system that would be constructed so long after the time contemplated in ANGTA (by way of example, many of the supply and cost studies that Congress directed the Commission to perform in its consideration of the various ANGTS proposals ran from 1977 through 1997).

B. Vitality of the Commission's 1977 Findings

The process leading to Congress' approval of the President's Decision was based on the Commission's Recommendation. As discussed above, the Commission made findings in a number of areas, as mandated by ANGTA. See 15 U.S.C. § 719c(c). The Commission's findings, which cover topics required by ANGTA, included the following:

- 1) The Commission estimated, for the period 1976-96, the volumes of Alaska natural gas that would be available to each region of the United States, along with transportation costs and delivered prices of those volumes. That period has passed, and market structure, transportation costs, and prices are likely significantly different.
- 2) The Commission determined the effects of projected deliveries of Alaska natural gas supplies on gas supply and demand for each region of the United States and on projected supplies of alternative fuels available to offset gas shortages. The energy market has changed dramatically, in terms of structure, supply, and demand, since 1977.
- 3) The Commission examined the impact of an ANGTS on competition. Again, energy markets have changed radically since 1977, including deregulation of wellhead pricing, unbundling of natural gas sales and transportation and open-access initiatives in both the natural gas and electric markets, so that competition is much more of a factor.
- 4) The Commission reviewed the extent to which the proposed system would provide a means for the transportation to the United States of natural gas and other commodities in addition to the Prudhoe Bay reserves. Energy supply and transportation markets have changed significantly in the last 20 years, and, to the extent a proposal is made that differs in route or capacity from that envisioned in the Commission's report, the conclusions therein might no longer remain valid.
- 5) As discussed herein, the Commission prepared an environmental impact statement for the project. Changes in the environment and in environmental law and policy during the intervening years may bring that document into question.
- 6) The Commission discussed technical factors, including safety and efficiency in design and operation and construction schedules, and capital and operating costs. Pipeline construction, design, and operation techniques have been greatly refined since 1977, and any difference in the proposal could lead to different conclusions than appear in the report.

7) The Commission studied the feasibility of financing. Financial markets and the availability of venture capital have changed radically since 1977.

- Given that ANGTA does not supercede the Commission's obligation to determine whether new pipeline facilities are in the public convenience and necessity, pipeline applicants and the Commission would have to face the issues of whether, in acting on any revised ANGTS proposal, the NGA would require the Commission to revisit its initial findings, and whether such an examination would be permissible under ANGTA.

C. Authority to Deviate from the President's Decision

As required by ANGTA, the President's Decision describes the ANGTS with some specificity. Section 2 is entitled "Description of the Nature and Route of the Approved System," and describes the route from Prudhoe Bay, through Alaska and Canada, and into the Midwest and Western section of the contiguous United States. Section 3, entitled "Identification of Facilities Included Within 'Construction and Initial Operation'", specifies "those facilities, the construction of which, and those operations, the conduct of which shall be encompassed" within the ANGTS (including pipeline diameters, the route length of various segments of the ANGTS, peak-day throughput (2.6 bcf) and average daily volume (2.4 bcf), and the locations by milepost and the horsepower of eight gas compression and refrigeration facilities), as well as rate and other terms and conditions. Section 5 establishes general terms and conditions for the ANGTS, which the Decision envisions will be enforced by the now-defunct OFI. These include significant conditions, such as one stating that, if the estimates of direct capital costs in 1975 dollars filed with the Commission immediately prior to certification "materially and unreasonably exceed" the estimates filed by Alcan on March 8, 1977, the Commission "may not issue a certificate for the project."¹³ Section 6 of the Decision, while recognizing that natural gas prices may be deregulated, calls for enactment of a gas pricing approach similar to that contained in the National Energy Plan,¹⁴ including a mechanism for allocating the cost of more expensive supplies to lower-priority users, rather than residential and commercial consumers. The President's Decision has been approved by Congress and thus has the force of law.

¹³This issue arose during Commission proceedings on the ANGTS in 1978-82, but it is questionable whether those proceedings will be germane in the context of any future ANGTS proceedings.

¹⁴See The National Energy Plan, Executive Office of the President, Energy Planning and Policy (April 29, 1977).

- To the extent that the project sponsors, or the Commission's view of public interest, call for deviation from the President's Decision, parties would face the issue of to what extent the Commission has the authority to approve alterations in the project.¹⁵ A key question would be what types of changes would amount to compelling a change in "the basic nature and general route of the approved transportation system," a term that is not defined in ANGTA. "Compel" is likewise not defined.¹⁶
- A related matter is whether the Commission would have authority to change the basic nature and route of the ANGTS if such changes were proposed by the ANGTS sponsor, and therefore arguably not "compelled" by the Commission.
- Pipeline applicants would have to determine the proper manner -- for example, an additional Presidential waiver or legislation -- for making any changes that were determined to be beyond the Commission's authority.
- Section 5 also states that the Commission must base return on equity for the projects on a variable, incentive rate of return. The Commission would

¹⁵ANGTA states that a Federal officer or agency "shall include in any certificate . . . issued . . . those terms and conditions identified in the President's decision as appropriate for inclusion except that the requirement to include such terms and conditions shall not limit the Federal officer or agency's authority under subsection (d) of this section." 15 U.S.C. § 719g(e). The referenced subsection, in turn, provides that

[a]ny Federal officer or agency may "add to, amend or abrogate any term or condition included in such certificate . . . except that with respect to any such action that is permitted but not required by law, such Federal officer or agency, notwithstanding any other provision of law, shall have no authority to take such action if the terms and conditions to be added, or as amended, would compel a change in the basic nature and general route of the approved transportation system or would otherwise prevent or impair in any significant respect the expeditious construction and initial operation of such transportation system.

15 U.S.C. § 719g(d). This statutory provision would require careful construction.

¹⁶To date, neither the Commission nor the courts have had occasion to construe these terms.

have to decide if it could depart from this concept if the project sponsors seek an alternate arrangement, or if the Commission, in light of today's preference for market-oriented ratemaking, concludes that the public interest so requires.

- To the extent that the Commission and other decision-makers determine that a cost allocation approach such as that contemplated by Section 6 is not consistent with current open-market regulation, applicants and the Commission would have to consider whether this approach could be altered.
- The President's Decision required that the Commission ensure that the ANGTS cost estimate not "materially and unreasonably" exceed those on which the Decision was based. Given the passage of time, the Commission would have to decide how to deal with this requirement.

D. Commission Flexibility with Respect to Alternative Proposals

The Commission could be presented with an Alaska natural gas transportation proposal other than the ANGTS, such as an alternative proposal under the NGA. ANGTA required the Commission to suspend all pending proceedings regarding a system for the transportation of Alaska natural gas, and, if a decision of the President designating such a system become final, to vacate the suspended proceedings and issue a certificate to the system designated by the President. 15 U.S.C. § 719c(a). The Commission performed these acts. ANGTA further provides that, once a system is designated, "any application or request [respecting the ANGTS] shall take precedence over any similar applications or requests of [any] Federal officer or agency."

- If an application for an Alaska gas transportation project were filed with the Commission under the NGA, the Commission would have to determine if ANGTA would in any way bar it from processing it, and, considering the phrase "shall take precedence," whether it would first have to act on a contemporaneous ANGTS application.

E. Environmental Issues

Congress provided that the Commission was to submit to the President along with its recommendation an environmental impact statement (EIS). 15 U.S.C. § 719c. Federal and states agencies, including the Council on Environmental Quality (CEQ), thereafter were to submit to the President their comments on, among other things, environmental issues. 15 U.S.C. § 719d. In transmitting his decision to Congress, the President was

required to find that the EIS for the ANGTS, as supplemented or modified by the President, was in compliance with the National Environmental Policy Act (NEPA). 15 U.S.C. § 719f. A decision by Congress approving the decision of the President was deemed conclusive as to the sufficiency of the EIS, and jurisdiction over the EIS was explicitly removed from the judiciary. 15 U.S.C. § 719h.

- Were the Commission now to issue a final certificate to the ANGTS, either as currently designed or under a different configuration, the issue of whether additional environmental review is desirable, is required, or is permitted would likely arise. If no additional environmental documentation were created, the Commission would be acting on an approximately 25-year-old environmental record. Yet, as noted above, ANGTA contemplated expedited environmental procedures, ending with Congress' approval of the President's Decision. This could be read to preclude further environmental study.
- If there were further environmental review, either on the original ANGTS system or of a revised proposal, the issue could be raised whether it would be covered by the bar on judicial review that applied to the original EIS, or whether it would be subject to review by the courts.

In addition, questions could arise regarding the applicability of other environmental statutes. Even if ANGTA were read to bar further NEPA analysis, the statute does not speak to other significant environmental legislation, which has come into greater prominence since ANGTA was passed. While the President's Decision transferred to OFI significant environmental authority that might otherwise be exercised by various Federal agencies, it did not transfer all such authority, nor did it affect state environmental authority. These issues include:

- Whether federal and state agencies could exercise their authorities under relevant environmental statutes with respect to an amended ANGTS proposal and, if so, to what extent. For example, ANGTA did not remove the National Marine Fisheries Service's and the U.S. Fish and Wildlife Service's authority under the Endangered Species Act. The ability of these agencies to impose fish and wildlife conditions on construction and operation of the ANGTS would arguably be limited by the prohibition on compelling changes basic nature or general route of the ANGTS. On the other hand, it could be argued that actions taken pursuant to statutory mandates were "required by law" and thus exempt from that prohibition.

- Although ANGTA does not purport to affect state authorities, requirements by the appropriate Alaska State agencies under Section 401 of the Clean Water Act and under the Coastal Zone Management Act could significantly delay or change ANGTS development.

F. Enforcement Authority under ANGTA

The President, through Reorganization Plan No. 1 of 1979, created the Office of Federal Inspector (OFI) for the ANGTS, to enforce terms and conditions of the President's Decision with respect to pre-construction, construction, and initial operations of ANGTS. The Reorganization Plan consolidated in OFI enforcement authority otherwise resident in the Commission, the Environmental Protection Agency, the Army Corps of Engineers, the Department of Transportation, the Department of Interior, the Department of Agriculture, and the Department of the Treasury. OFI was abolished, and its functions transferred to the Secretary of Energy by Section 3012(b) of Pub. L. 102-486.

- If the ANGTS begins to move forward again, a decision would have to be made as to how the exercise of the authorities formerly resident in OFI would take place.
- To the extent that the Secretary of Energy is now authorized to exercise certain environmental oversight responsibilities transferred from the Departments of the Interior and Agricultural and the Environmental Protection Agency, and to the extent that the Commission delegated certain of its ratemaking and conditioning authority to OFI, issues could arise if any of those agencies attempt to retract those authorizations.

G. Transportation within the United States

- Although ANGTA does not specify exactly how gas is to travel to market, given that the "pre-build" legs of the system, Northern Border and PGT, were certificated as part of the ANGTS, if the ANGTS becomes operational, the issue could arise whether Arctic natural gas must be transported within the United States via the "pre-build" legs, which have been transporting other volumes for the last two decades, or whether other arrangements could be made.

H. Issuance of a Final Certificate

ANGTA provides that, if a Presidential designation of an Alaska gas transportation system takes effect, the Commission "shall forthwith . . . issue a certificate of public convenience and necessity respecting such system." 15 U.S.C. § 719(c)(a)(2). The Commission has issued a conditional certificate to the Alaska segment of the ANGTS, but noted that a number of issues regarding the ANGTS remained unresolved, including final design, rates, economics, marketability, financing, and cost-of-service.

- If the Commission is asked to issue a final certificate for the ANGTS, the Commission would have to decide whether it would have the authority to examine the issues that it previously noted remained open, in order to determine whether the public convenience and necessity require issuance of a certificate, or whether that issue had been effectively foreclosed by § 719(c)(a)(2). The answer to the above question could change if the Commission is presented with an amended ANGTS proposal, or if an application is also filed under the NGA.

I. International Considerations

The 1979 Agreement Between the United States of America and Canada on Principles Applicable to a Northern Natural Gas Pipeline, which was made part of the President's Decision, and thereafter approved by Congress, specifies the route of the ANGTS and contains numerous conditions applicable to the system.

- The question could arise whether, to the extent an ANGTS proposal is made that deviates from the details of the Agreement, the Commission has authority to approve it, and whether a revised ANGTS would require international negotiations. See 15 U.S.C. § 719e(d).
- To the extent that particular proposals either favor or disfavor transportation of either American or Canadian gas supplies, the provisions of the U.S.-Canada Free Trade Agreement and the North American Free Trade Agreement might be relevant.

APPENDIX: LEGAL AND HISTORICAL BACKGROUND

This section presents a more detailed background of ANGTA, and related administrative, legislative, and judicial decisions thereunder.

In the winter of 1967-68, the largest single petroleum reserve on the North American continent was discovered at Prudhoe Bay on the North Slope of Alaska. At the time of its discovery, the Prudhoe Bay field, containing over 20 trillion cubic feet of saleable natural gas and over 9 trillion barrels of recoverable oil, represented approximately 10 percent of the nation's known reserves.¹⁷ Just after the State of Alaska's 1969 lease sale of the rights to the Prudhoe Bay Oil Pool, the three largest leaseholders, Exxon, Arco and Sohio, sought to build an oil pipeline, the Trans-Alaskan Pipe Line System (TAPS), from Prudhoe Bay to the Gulf of Alaska. Legal disputes stalled initial efforts to build the TAPS until November of 1973, when Congress and the President approved the plan and provided for expedited procedures.¹⁸ Shortly thereafter, various consortiums began investigating the feasibility of transporting natural gas from Prudhoe Bay, as well as from other areas in Alaska and neighboring Canada, to the continental United States.¹⁹

On March 21, 1974, the Alaskan Arctic Gas Pipeline Company applied for Commission, Department of Interior and Canadian approvals to build a 48-inch, 3,700-mile gas pipeline from the North Slope of Alaska to the MacKenzie Delta area of Canada's Northwest territories. This system would traverse south to Alberta and then divide into two legs to serve markets in the West and Mid-west. Gas would be delivered from the termination of the line through existing pipelines by displacement. The Alaskan Arctic Gas project would also deliver Canadian MacKenzie Delta gas to Canadian pipeline purchasers.

¹⁷President's Decision, at i.

¹⁸Id., reference Trans-Atlantic Pipeline Authorization Act, P.L. 93-153, 87 Stat. 567.

¹⁹In addition to the estimated 26 tcf of proved reserves of natural gas at Prudhoe Bay, additional reserves of natural gas were discovered in Canada's Mackenzie Delta and Beaufort Sea. Projections at that time, though uncertain, ranged from 0.4 to 1.25 Bcf per day. Other areas in Alaska, including naval Petroleum Reserve No. 4 and offshore areas have been estimated to contain as much as 150 trillion cubic feet of undiscovered recoverable natural gas resources.

On September 24, 1974, the El Paso Alaska Company applied to the Commission for a certificate to construct a 42-inch, 800-mile natural gas pipeline parallel to the trans-Alaska oil pipeline from the North Slope to southern Alaska. The gas would then be liquefied and shipped 1,900 nautical miles to southern California in cryogenic tankers. Natural gas would then be supplied to contract purchasers throughout the nation, by displacement, primarily through existing pipeline facilities.

In an order issued January 23, 1975,²⁰ the Commission consolidated and set for hearing the El Paso Alaska and the Alaskan Arctic proceedings, together with those applications filed by other companies for authorization to construct and operate facilities to transport the Alaskan and Canadian gas once it reaches the lower 48 states, since they appeared to be mutually exclusive, competitive proposals.

A third competitive application was filed with the Commission on July 9, 1976, (and later amended on March 8, 1977) by Alcan Pipeline Company and Northwest Pipeline Company, for authorization to construct the Alcan Project. The Alcan Project is a pipeline system with diameters varying from 48 inches to 36 inches from Prudhoe Bay paralleling the TAPS oil pipeline to Delta Junction, where the pipeline would then follow the so-called Alcan Highway to the Alaska-Yukon border. Canadian companies would sponsor a pipeline from the Yukon border to Fort Nelson, British Columbia and Zema Lake, Alberta to connect with existing systems to bring Alaska natural gas to consumers in the United States. This system is proposed to include approximately 1,700 miles of new pipeline construction together with an extensive expansion or reconstruction of existing pipelines to accommodate the volumes of gas that would be delivered from Northern Alaska. Alcan's application was consolidated into the ongoing hearings.

In its January 1975 order instituting the proceedings on the competitive applications for an Alaskan natural gas transportation system, the Commission noted that continuing natural gas shortages were threatening the nation's economic and social well being in an almost unprecedented manner. Congress too was aware of this threat and was seeking to alleviate the growing shortage of natural gas in the contiguous 48 states by means of developing an economical transportation system to bring natural gas production from Alaskan reserves to the "lower 48" states. The result of the Congressional effort to solve this problem was the enactment of ANGTA

A. ANGTA

²⁰El Paso Alaska Company, et al., 53 FPC 239 (1975).

By enacting ANGTA the Congress stated its dual purpose of 1) providing "the means for making a sound decision as to the selection of a transportation system for delivery of Alaska natural gas ... and 2)... if such a system is approved under this chapter, to expedite its construction and initial operation by...permitting the limitation of administrative procedures."²¹

To accomplish these goals, Congress established in ANGTA a five-part procedural framework involving administrative, Executive and Congressional participation. First, the Commission was directed to make a recommendation to the President as a specific transportation system,²² and other federal and state agencies and others were afforded opportunity to comment on the Commission's recommendation.²³ Second, on the basis of the Commission's recommendations and any comments thereto, the President was to decide whether a specific transportation system should be approved, and if so, identify such system.²⁴ Third, Congress was to expeditiously consider the President's decision for approval by joint resolution.²⁵ Fourth, all federal agencies and officers were required to grant, expeditiously, all authorizations "necessary or related to the construction and initial operation" of the approved system, and they were directed to give ANGTS precedence over any similar projects.²⁶ In order to facilitate expediency, the Act gave the President an important role, authorizing him (1) to recommend, for Congressional approval, that any provisions of law that impede the expeditious construction and initial operation of an ANGTS be waived,²⁷ and (2) to select an Federal Inspector to be responsible for coordinating all federal activities and enforcing all federal requirements relating to the project.²⁸ Finally, ANGTA limited judicial review of any

²¹Section 3 of ANGTA, 15 U.S.C. § 719a.

²²§ 719c.

²³§ 719d.

²⁴§ 719e.

²⁵§ 719f.

²⁶§ 719g.

²⁷§ 719e(a)(4)(D); § 719f(g).

²⁸§ 719e(a)(5). As discussed below, the Federal Inspector was subsequently given authority to schedule and expedite Federal agencies' permits, to review and approve the

(continued...)

agency action to questions of agency violation of constitutional rights or statutory authority.²⁹

B. The Commission's Recommendation to the President

As required by ANGTA, 15 U.S.C. § 719c(b), the Commission, on May 1, 1977, issued its recommendation to the President concerning selection of a transportation system to deliver Alaska natural gas to the continental United States.³⁰ The recommendation analyzed in detail all aspects of the three proposals, including gas reserves and deliverability, economic benefits and cost of service, environmental impacts, socioeconomic impacts, engineering and technical issues, competitive impacts, and financing and tariffs. The Commission concluded unanimously that it was in the best interests of the citizens of the United States to build a transportation system for Alaska natural gas, and that, regardless of which of the three competing systems was chosen, the benefits of Alaska gas fully justified the costs and risks involved.³¹

All four members of the Commission (one seat was then vacant) agreed that an overland natural gas pipeline would be a superior alternative to El Paso's proposal to build a pipeline to Prince William Sound, Alaska, where the gas would be liquefied, shipped via tanker to California, reliquefied, and delivered into the U.S. pipeline grid. Two Commissioners preferred the Alaskan Arctic Gas Pipeline Company proposal, pursuant to which a pipeline would traverse the north coast of Alaska and the Yukon Territory, Canada, pass through the MacKenzie Delta into Alberta, and then divide into an eastern leg that would connect in Saskatchewan to the proposed Northern Border pipeline, which would carry the gas to Dwight, Illinois, and a western leg, that would run through British Columbia, connecting at the U.S. border with a California segment, to be

²⁸(...continued)

ANGTS design and final cost estimate, and to enforce all Federal permits and authorizations regarding ANGTS. The Federal The Office of the Federal Inspector was abolished by Congress in 1992, and all the powers theretofore granted to the federal Inspector were transferred to the Secretary of Energy. See Pub.L. 102-486, Title XXX, § 3012, October 24, 1992, 106 Stat. 3128.

²⁹§ 719h.

³⁰58 FPC 810.

³¹The Commission based this finding on a study of the net national economic benefits (the present value of the total social benefits of each project, minus its costs) of the projects.

constructed by Pacific Gas Transmission Company. The other two Commissioners preferred the Alcan Pipeline Company/Northwest Pipeline Company proposal, which required constructing a pipeline south through Alaska along the routes of the Alyeska oil pipeline and the Alcan Highway to the Canadian border, and thence through Alberta and British Columbia to the United States, to a connection with PGT at the western end of the system, and with Northern Border to the east.

The Commission concluded that any of the systems, each of which would cost over \$ 10 billion, could deliver 2.0-2.5 billion cubic feet of gas (bcf) per day (more with expansion) at an average delivered price of less than \$2.10 per metric cubic foot (mcf).

On environmental matters, the Commission found that, while the Arctic Gas project would have fewer environmental impacts than its competitors, but that each of the projects could be constructed in an environmentally acceptable manner.

With regard to the financing of an ANGTS, the Commission concluded that none of the sponsors had shown the ability to finance its proposal. The Commission considered, but was leery of, requiring consumers to bear the some of the financing burden and, in accordance with the recommendation of the Treasury Department, did not recommend Federal guarantees for the project. Rather, the Commission expressed the hope that additional private capital could be attracted.

ANGTA requires the Commission to include in its recommendation "the terms and conditions permitted under the Natural Gas Act, which the Commission deems to be appropriate for inclusion in a certificate of public convenience and necessary." 15 U.S.C. § 719c(e). Believing that final conditions must be site-specific, the Commission nevertheless included in the recommendation draft general, environmental, and technical terms and conditions that it believed would be appropriate, whichever system was ultimately selected.

C. International Agreements

As part of the process of considering and approving the ANGTS proposal, the United and Canada entered into two agreement, the Transit Pipeline and Treaty and the Agreement on Principles Applicable to a Northern Natural Gas Pipeline.

1. The Transit Pipeline Treaty

The Transit Pipeline Treaty, signed on January 28, 1977 and entered into force on September 19, 1977, governs all existing and future transit pipelines³² in the United States and Canada. By this treaty, the two countries agree to a number of principles of non-discrimination to ensure the uninterrupted transmission of "hydrocarbons in transit." These principles include agreements 1) that neither party will interfere with the transportation of hydrocarbons in transit; 2) that the parties will facilitate the necessary permitting and other authorization for the import or export of hydrocarbons in transit; and 3) that neither party will discriminate between transit pipelines and other pipelines regarding the imposition of taxes, duties or other monetary charges. All disputes arising under the treaty are to be arbitrated if negotiation fails to resolve them. This treaty has an initial 35 year term which expires in October of 2012.

2. The Agreement on Principles

The Agreement on Principles, signed on September 20, 1977 between Canada and the United States and incorporated two days later into the President's decision as section 7 thereof, sets out principles to coordinate and expedite the construction and operation of a joint pipeline system to provide for the transportation of natural gas from Alaska and Northern Canada. The Agreement's principles are to be implemented through appropriate terms and conditions in any necessary authorizations relate to the joint pipeline system.³³

The pipeline's entire route, divided into 11 zones, is described in Appendices I and II to the agreement, and the parties jointly commit to expeditiously authorize and construct the pipeline. A timetable is established by which the Alaska segment was to be completed by January 1, 1980, and the entire system was to be constructed and operating by January 1, 1983. According to the Agreement, the system's total initial capacity is 3.6 bcf/d, 2.4 bcf/d of which is Alaska gas and the remaining 1.2 bcf/d is Canadian gas, and the Agreement contemplates further expansion is to occur.

Calling for the project to be privately financed, the agreement requires as a cost-saving incentive that the return on equity will be based on a variable rate of return. Additionally, the Agreement provides that the cost of service for each of the 11 zones are

³²A "transit pipeline" is a pipeline or any part thereof (including compressors, meter stations and other appurtenances) located on one party's territory used to transport hydrocarbons (e.g. natural gas) which did not originate in that territory, for delivery to the territory of the other party. See Transit Pipeline Treaty, Article I,(a)and (c).

³³The Agreement has a term of 35 years, and is renewed automatically, unless a party chooses to terminate it within 12 months of the expiration date.

to be based on the volumes set out in the transportation contracts, with U.S. shippers to bear a percentage of Zone 11's (the Dawson-Whitehorse portion of the Dempster Line) cost of service.

In the agreement the parties reiterate their mutual commitment to the Transit Pipeline Treaty's provisions concerning non-interference with throughput and non-discriminatory treatment with respect to taxes, fees and other charges. In particular, limits are set for the Yukon Property Tax relating to the facilities in that territory. Additionally, the parties agree to ensure that goods and services supplied to the pipeline will be competitively priced. Moreover, the parties commit that their respective senior officials and regulatory authorities will consult and coordinate with each other to facilitate the pipeline system's construction. To this end, the parties agree to establish a technical study group to test and evaluate the safety, reliability and efficiency of various combinations of pipe diameter and pressure, while acknowledging that the appropriate regulatory authorities will make the ultimate decisions regarding pipeline specifications.

D. The President's Decision

On September 22, 1977, the President issued his Decision and Report to Congress on the Alaska Natural Gas Transportation System. The Decision is structured in conformance with ANGTA's requirements.

First, the President designates the Alcan Pipeline Company to construct and operate the portion of the ANGTS within Alaska. The President designated Northern Border Pipeline Company to construct the "pre-build" eastern portion of the system from the U.S.-Canadian border in Saskatchewan to Dwight, Illinois. All persons were allowed to participate in the ownership of the two pipelines, with the exception of Alaska gas producers. The Pacific Gas Transmission Company was designated to construct and operate the "pre-build" western leg of the system, from the U.S.-Canadian border in British Columbia to the California-Oregon border. Pacific Gas and Electric Company was designated to construct the remainder of the Western leg in California.

Second, the President discussed his selection of the Alcan route, beginning in Prudhoe Bay, paralleling the Aleyeska oil pipeline southward to Delta Junction, Alaska, after which the line would follow the Alaska Highway and Haines oil products pipeline right-of-way through British Columbia and the Yukon Territory, terminating at a connection with the proposed Foothills Pipeline at the Alaska-Yukon Territory border. After traversing portions of Canada, the system would connect with Northern Border in the east and PGT in the west.

In the third section of his Decision, the President identified the facilities for the Alcan Project, including the diameter of the various pipeline segments, eight compression stations, metering facilities, and a central operating center. The Decision also provided specifications regarding the eastern and western legs of the system, to be located in the United States.

Section 4 of the Decision comprised the President's waiver of statutory provisions regarding the export of natural gas, as discussed further below.

The fifth portion of the Decision sets forth general terms and conditions to be incorporated into any certificate or other authorization issued for the ANGTS. The conditions relate to, among other things, construction costs and management, general operating strategies, quality assurance, safety and design, the environment, and finance. The Decision anticipates that additional conditions will be developed prior to actual pipeline construction. To enforce the terms and conditions, the Decision provides that the President will appoint a Federal Inspector, who will be supervised by an Executive Policy Board comprising the Secretaries of the Interior, Energy, and Transportation, the Administrator of the Environmental Protection Agency, and the Chief of the Army Corps of Engineers, or their designees, as well as the Federal Inspector.

Section 6 discusses the pricing of Alaska natural gas.³⁴

Section 7 of the Decision incorporates the Agreement on Principles. Among other things, it details the pipeline route, pipeline size, and pressure, and anticipates initial operation of the pipeline by January 1, 1983. It provides for capacity of 2.4 bcf per day of Alaska gas, and 1.2 bcf per day of Canadian gas. The Agreement recognizes that the construction of the ANGTS will be privately financed. To compensate for lost benefits to Canadian producers because the route bypasses areas in the north, U.S. shippers will participate in the cost of service of one of the rate zones in Canada on the Foothills Pipeline.

The President's Decision was accompanied by a report, which makes the case for the gas supply and economic benefits of an Alaska natural gas transportation project in general, and the Alcan project in particular, concludes that the project can be financed in the private sector without undue risk to consumers, finds that the Alcan route is environmentally superior to its two competitors, and determines that economic considerations — including a lower cost of service, higher net national economic

³⁴Natural gas prices have since been deregulated at the wellhead. See the Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157.

benefits, a greater amount of energy delivered, and a greater ability to absorb cost overruns — favor the Alcan project, as do safety, reliability, and expansibility.

The Report also outlines the rationale for the Federal Inspector: coordinated Federal oversight will provide coherent and uniform rules, provide consistent enforcement, and avoid cumulative, delay-inducing rules and bureaucratic procedures, and details Federal Inspector's responsibilities. It discusses the conclusion of the Commission and the Department of Justice that certification of a transportation system for Alaska natural gas will not have a significant impact on competition in the natural gas transportation and distribution industries. The Report then deals with national security considerations, the construction of the western leg of the system, and issues related to the agreement with Canada. The Report concludes by summarizing comments received during the pendency of the Commission's and the President's consideration of the ANGTS.

E. Congressional Approval

Congress approved the President's Decision by Joint Resolution, effective November 8, 1977. H.R.J.Res. 621, Pub.L. No. 95-158, 91 Stat. 1268, 95th Cong., 1st Sess. (1977).

F. Subsequent Commission Actions

The Commission has issued many orders relating to the ANGTS. The most significant of these are summarized below.

1. Alcan Pipeline Co., et al, 1 FERC ¶ 61,248 (1977). As required by ANGTA, the Commission vacated the previously suspended competitive proceedings regarding the proposals to transport Alaska natural gas, and issued conditional certificates to Alcan, Northern Border and PGT, both of which actions the Commission stated were ministerial. The Commission stated that it viewed the issuance of the conditional certificates as "a step which initiates the detailed process of final certification," noting that the President had not waived Commission review of properly constituted applications under NGA § 7(c). The Commission noted that, [f]ollowing issuance of these conditional certificates but before final certification and construction of the Alcan Pipeline Project, numerous questions must be raised and answered by the Commission..." The Commission reiterated that, in its Comments on the President's Decision, it had listed a number of matters which would require substantial inquiry, including gas reserves and deliverability, gas gathering, processing and conditioning (allocation of costs and liquefiable hydrocarbons), extraneous source water injection, wellhead price (depending upon Congressional action on the National Energy Plan), gas purchase contracts, financial plan

(including consideration of a variable rate of return provisions and possible debt guarantees by the State of Alaska and the Prudhoe Bay field producers), shippers' tariffs (including matters set forth in the Agreement on Principles), pipe selection (choice of diameter and pressure, and size and volume of the Eastern and Western Legs.

The Commission also discussed coordination of its efforts with those of the Federal Inspector.

2. Order No. 31, 7 FERC ¶ 61,236, on reh'g, Order No. 31-B, 8 FERC ¶ 61,250 (1979). Consistent with the President's Decision, the Commission established a variable, or incentive, rate of return for the ANGTS, in order to relate the allowed rate of return for the project to actual capital costs, as opposed to projected costs, to assign appropriate risks to the project's sponsors, and to establish the share of the risk of cost overruns to be borne by consumers. These order also approved the tariffs for the Alaska and Northern Border (eastern leg) segments of the ANGTS.

3. Alaskan Northwest Natural Gas Transportation Co., 8 FERC ¶ 61,129 (1979). The Commission approved the ANGTS sponsor's application regarding design specifications and initial capacity for the Alaska segment of the ANGTS. Pipeline diameter was set of 48 inches, pressure was 1260 psig maximum allowable operating pressure, and the project was to include compressor station size and spacing for an initial capacity of 2.0 to 2.4 bcf per day, to be capable of expansion, through additional compression, to an average daily volume of 3.2 bcf.

4. Northwest Alaskan Pipeline Co., 10 FERC ¶ 61,032, supplemental order and order on hearing, 11 FERC ¶ 61,279 (1980). The Commission issued certificates to Pacific Gas Transmission Company, Northwest Alaska Pipeline Company, Pacific Interstate Transmission Company, Northwest Pipeline Company, and El Paso Natural Gas Company, to construct and operate the western leg of the ANGTS, and to perform related transportation services. The Commission determined that it would issue a separate decision regarding the ANGTS eastern leg.

5. Alaska Natural Gas Transportation System, 10 FERC ¶ 61,306 (1980). The Commission delegated to the Office of the Federal Inspector authority pursuant to NGA § 7 to attach terms and conditions to the ANGTS certificates to the extent necessary to implement the cultural resource protection requirements of the National Historic Preservation Act.

6. Northwest Alaska Pipeline Co., 11 FERC ¶ 61,088, supplemental order, 11 FERC ¶ 61,301 (1980). The Commission issued certificates to Northern Border Pipeline Company, Northwest Alaskan Pipeline Company, Northern Natural Gas Company, united

Gas Pipe Line Company, and Panhandle Eastern Pipe Line Company, to construct and operate the eastern leg of the ANGTS, and to perform related transportation services.

7. Delegation Order (Dec. 19, 1980). The Commission delegated to the Office of the Federal Inspector the Commission's authority under Sections 4, 5, 7, and 8 of the NGA to review and approve costs and related accounts of the ANGTS for inclusion in rate base.

8. Alaskan Northwest Natural Gas Transportation Co., 18 FERC ¶ 61,002 (1982). The Commission implemented that portion of President Reagan's waiver (discussed below) that required it to include within the ANGTS the gas conditioning plant at Prudhoe Bay.

9. Alaskan Northwest Natural Gas Transportation Co., 20 FERC ¶ 61,321 (1982), on reh'g, 22 FERC ¶ 61,321 (1983). The Commission established a certification cost estimate, center point values for the incentive rate of return, and resolved other incentive rate of return issues regarding the Alaska segment of the ANGTS.

10. Recovery of Alaska Natural Gas Transportation System Charges, Order No. 320, 48 Fed. Reg. 34,442 (1983), FERC Stats. & Regs., Regulations Preambles, 1982-85, ¶ 30,475. The Commission established a tracking mechanism for shippers of Alaska natural gas to recover costs incurred for the use of the ANGTS.

G. Presidential Waivers

Two provisions of ANGTA permit the President to propose waivers of law to assist in completing an ANGTS. First, the President may, as part of his Decision, identify provisions which are subsumed in the Decision and require waiver "in order to permit the expeditious construction and initial operation of [an ANGTS]." 15 U.S.C. § 719e(4)(D). As part of his Decision, President Carter, waived the requirement of Section (g) of the NGA, 15 U.S.C. § 717b, that the Commission authorize the export of natural. The President also waived Section 103(d)(1) of the Energy Policy and Conservation Act (EPCA), which requires a Presidential Permit for such exports. The President noted that, pursuant to the Agreement on Principles, the ANGTS would deliver limited quantities of Alaskan gas to communities in the Yukon Territory and the western provinces, to be replaced by alternate volumes downstream in Canada.

ANGTA also provides that, at any time after the Decision is submitted to Congress, the President can propose additional waivers. 15 U.S.C. §719f(g)(1). In 1981, President Reagan submitted such a waiver, with the intent of clearing away government obstacles to the private financing of an ANGTS. To that end, President Reagan waived

portions of President Carter's Decision that prevented producers from holding equity interests in ANGTS, and that excluded a natural gas processing plant from the description of ANGTS. The waiver also removed impediments to allowing the ANGTS tariff to conform to the tariff approved by Canada's National Energy Board and to establishing a minimum bill tariff for the ANGTS, thus assuring a guaranteed revenue stream for the project. The waiver eliminated any NGA requirement that the Commission hold a formal, on-the-record, evidentiary hearing before issuing the ANGTS certificates, leaving the Commission discretion to determine if such a hearing is necessary, and withdrew from the Commission its authority under the NGA to change the project's tariffs in such a manner as to reduce project revenue below the level necessary to service project debt. Finally, President Reagan waived technical provisions of the NGA and EPCA.

Both of the Presidential waivers were approved by Congress.

H. Office of the Federal Inspector

In addressing the matter of an Alaskan pipeline, Congress was mindful of the schedule delays and cost overruns associated with the building of the Transalaska Pipeline System (TAPS). Recognizing that the problems experienced by the private companies involved in TAPS were exacerbated by the lack of a clearly-defined Federal role, Congress provided in ANGTA for the creation of a new independent agency for the purpose of monitoring the construction of the ANGTS. Specifically, ANGTA authorized the President to select a Federal Inspector to be responsible for coordinating all Federal activities related to the pipeline project, and for assuring timely, efficient, and environmentally sound construction. Accordingly, the President's decision directed that a limited and temporary restructuring of governmental enforcement authority over ANGTS be implemented through a reorganization plan to vest such responsibilities with the Office of the Federal Inspector (OFI) for the duration of the ANGTS project.

Through the enactment of the Reorganization Plan No. 1 of 1979, the Federal Inspector was given authority to schedule and expedite federal agencies' permits, to review and approve the design and final cost estimate, and enforce all Federal permits and other authorizations. The Plan transferred to the Federal Inspector the Commission's NGA section 3 and 7 jurisdiction to enforce the Commission's certificates and import authorizations issued to the project sponsors.³⁵ Indeed, the Plan transferred enforcement

³⁵ Additionally, by delegation order issued on March 31, 1980, the Commission delegated to the Federal Inspector, its NGA section (e) conditioning authority with

(continued...)

functions of all Federal agencies with respect to the Federal statutes and regulations, and the terms, conditions and stipulations of all authorizations issued by such Federal agencies concerning the pre-construction, construction and initial operation of the ANGTS. Agencies whose enforcement functions were transferred to the OFI include, in addition to the Commission, the Environmental Protection Agency, the Army Corps of Engineers, the Department of Transportation, the Department of Interior, the Department of Agriculture, and the Department of the Treasury. As per Executive Order No. 12142, the Reorganization Plan became effective on July 1, 1979, to remain in effect until one year after initial operation of the completed pipeline system.

In July 1979, the Office of the Federal Inspector for the ANGTS officially began operations. However, as project activity on the Alaska segment began to slow down in the early 1980's, the Office of the Federal Inspector scaled down its activities accordingly. In 1992, Congress abolished the Office of the Federal Inspector and transferred to the Secretary of Energy all functions and authority vested in the Federal Inspector, where they currently remain.³⁶

I. Judicial Review

Given the limits placed by ANGTA on judicial review of actions taken pursuant to that statute, the major decisions rendered under the statute (the Commission's Recommendation and the President's Decision) have not been the subject of appellate proceedings, and there have been relatively few instances in which the courts have been called upon to construe ANGTA in a significant way.³⁷ In essence, the cases uphold Commission decisions made pursuant to ANGTA, and affirm the limited nature of judicial review permitted under that statute. For the reasons discussed in this report, it is not clear whether, or to what extent, the courts would find the limits in ANGTA applicable to a revised proposal. The cases dealing with ANGTA are discussed below.

³⁵(...continued)

respect to implementing the requirements of the National Historic Preservation Act of 1966. And, in a December 19, 1980 delegation order the Commission delegated to the Federal Inspector its authority under sections 4, 5, 7, and 8 of the NGA, and related regulations, to review and approve costs and related accounts of the ANGTS for inclusion in the ANGTS's sponsors' rate base.

³⁶See section 3012(b) of Pub.L. 102-486.

³⁷There are other cases that do not deal with the substance of ANGTA, but rather with peripheral issues, such as Commission action regarding Northern Border's rates.

Midwestern Gas Transmission Co. v. FERC, 59 F.2d 608 (D.C. Cir. 1978), was the first, and most extensive appellate review of ANGTA. Petitioners sought review of three Commission orders which, pursuant to ANGTA, conditionally authorized Northwestern Alaska Pipeline Company to import Alberta Natural Gas, through the southern "pre-built" portion of the ANGTS (Northern Border), pursuant to contracts with Pan-Alberta Gas Ltd.

The court found that, based on portions of ANGTA and its legislative history, as well as the President's decision, all of which indicated that deliveries of Canadian natural gas through ANGTS were contemplated, the Commission was justified in finding that the proposed deliveries were a material part of the desirability of the ANGTS and thus were either "necessary" or "related" to that system. In consequence, the court held, the Commission had properly granted the authorizations under Section 9 of ANGTA, which requires federal agencies to take action to grant certificates and authorizations that are "necessary or related to the construction and initial operation of the approved [Alaska Natural Gas] transportation system."³⁸

The court also rejected claims that the Commission had erred in not holding adjudicatory hearing before granting the authorizations.³⁹ The court explained that Section 10 of ANGTA limits the scope of its review to "claims alleging that an action will deny rights under the Constitution of the United States, or that an action is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." The court held that Section 3 of the NGA does not require the Commission to hold a hearing before it grants an import authorization, and that the Commission need not hold a hearing under NGA Section 7 until such time as it was making the authorizations final.

Earth Resources Co. of Alaska v. FERC, 617 F.2d 775 (1980). Petitioners sought review of the Commission's orders approving Alaska Northwest's proposed pipeline diameter and pressure. They alleged that the Commission violated due process by deciding the pressure issue in isolation from related issues such as carbon dioxide content and conditioning plant design, thereby foreclosing options on those matters with due

³⁸The court also declined to review, based on a lack of ripeness and the absence of immediate harm to petitioners, various issues, including whether the Canadian contracts were anti-competitive, would compete with existing import authorizations, or were otherwise not in the public interest.

³⁹The court dismissed petitions filed under the NGA, based on its finding that the orders in question were subject to exclusive judicial review under Section 10 of ANGTA.

process. The court found that petitioners had not asserted any damages and that, in addition, the Commission was in essence exercising a rulemaking function, which does not give rise to the due process rights inherent in a hearing. Further, the court held that the objections to the Commission's actions were an attack on the reasonableness of the Commission's choice of procedures, a matter which ANGTA removed from the court's jurisdiction.

Petitioners asserted that, because Alaska Northwest had asked for a decision on particular issues, instead of filing an application, and because the Commission had resolved the matter without requiring detailed supporting exhibits and without considering all factors bearing on the public convenience and necessity, the Commission had improperly acted outside the normal framework for certificate applications under the NGA. The court found that these matters lay within the Commission's discretion and dealt with questions of reasonableness, both of which ANGTA expressly insulates from judicial review.

Finally, petitioners contended that the Commission had violated NEPA by failing to prepare an environmental impact statement on the pipeline pressure and capacity issues. The court held that, pursuant to ANGTA, it lacked jurisdiction to review NEPA compliance for any issues relative to the proposed pipeline.⁴⁰

General Services Customer Group v. FERC, No. 80-1803 (D.C. Cir. 1980) (unpublished). The court, in a per curiam opinion, affirmed the Commission's orders certificating the Northern Border pipeline (the pre-build eastern leg of the ANGTS).

Metzenbaum v. FERC, 675 F.2d 1282 (1982). In this case, members of Congress, state officials, and consumer advocates challenged the validity of Pub.L. No. 97-93, which enacted President Reagan's proposal to set aside certain portions of President Carter's decision, the Natural Gas Act, and the Energy Policy and Conservation Act, in order to "clear away governmental obstacles to proceeding with private financing of [the ANGTS]."

The court first disposed of a claim that the procedures followed in passing Pub.L. No 97-93 violated rules of the U.S. House of Representatives by determining that the issue was a non-justiciable political question. The complainants also alleged that, to the

⁴⁰The court also found that, in light of the time constraints and massive nature of the Commission's efforts relative to ANGTS, the Commission was not required to prepare a statement of the probable impact of its actions on energy efficiency and conservation, as otherwise required by the Energy Policy and Conservation Act of 1975.

extent Pub.L. No. 97-93 limited the Commission's authority to revise the ANGTS rates downward and that permitted consumers to be charged for pipeline construction costs prior to delivery of any gas, the law would violate the Fifth Amendment's protection against takings.

The court found that the statute was facially valid, since it permits, but does not require pre-billing, and did not remove the just and reasonable standard that is generally applicable to initial rates. The court stated that the takings claims were unripe, and could properly be brought only after the occurrence of any action that they claimed would deny their rights.

Complainants also objected to the Commission's issuance, without notice and comment, of orders including in the ANGTS rate base a gas conditioning plant that would prepare gas for transmission through the ANGTS. The court held that issuance of the order, which was required by President Reagan's waiver, was non-discretionary, so that notice and comment would have been futile.

Iowa State Commerce Comm'n v. Office of the Federal Inspector of the Alaska Natural Gas Transportation System, 730 F.2d 1566 (D.C. Cir. 1984). Iowa challenged final orders by OFI allowing Northern Border, the operator of the eastern leg of ANGTS, to include in its rate base profits realized by Northern Engineering International Co., as part of project management costs paid by Northern Border. OFI determined that, while Northern Engineering was a subsidiary of a company that indirectly held a 22.75 percent interest in Northern Border, Northern Engineering did not control Northern Border, and, moreover, Northern Engineering's profits were reasonable, under a market test.

The Court upheld OFI's orders. It first explained that, under Section 10 of ANGTA, its review was limited to determining whether OFI's actions either denied Iowa's constitutional rights or were "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." The court noted that two types of agency action are reviewable under Section 10: (1) actions taken pursuant to Section 9 of ANGTA, which includes any "certificate, right-of-way permit, lease or other authorization" that is required for "action which is necessary or related to the construction and initial operation" of the ANGTS, and (2) enforcement of any "statutes . . . , regulations . . . [or] terms, conditions and stipulations of grants, certificates, permits, and other authorizations issued by Federal agencies with respect to pre-construction, construction and initial operation" of the ANGTS. It then determined that OFI's rate base determinations fit into both of these categories, and were thus subject to the constraints of Section 10.

The Court next examined Iowa's substantive complaint that OFI, by failing to conduct an adjudicatory hearing, had deprived it of its statutory rights. The Court

concluded that, because ANGTA precludes the courts from looking behind agency decisions to determine their reasonableness or to determine whether they were adequately supported by the record, hearing requirements beyond "notice and comment" are not required for pipeline rate base determinations under ANGTA. Based on this standard, the Court held that OFI had considered Iowa's arguments, and therefore complied with ANGTA. The Court also held that OFI was not obligated to allow Iowa to conduct discovery. Finally, the Court stated that OFI does have an obligation to state sufficient findings and reasons supporting its decision to permit the limited judicial review allowed under ANGTA, and that, in a final rate based determination, OFI must address all significant, pertinent issues of fact and policy that are raised. The Court found that OFI had satisfied this requirement.

The courts have also made it clear that state and local regulators lack authority to impose conditions relating to the constructions of the ANGTS. See FERC v. Pub. Serv. Comm'n of North Dakota, 513 F.Supp 653 (D. ND 1981) (holding that ANGTA preempts state from ordering pipeline route different than that authorized by the Commission) Northern Border Pipeline Co. v. Jackson County, Minnesota, 512 F.Supp. 1261 (D. MN 1981) (enjoining, on preemption grounds, conditional use permit issued by county purporting to set minimum depth for burial of pipeline).