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REPORT TO THE PRESIDENT

COMMENTS ON THE RECOMMENDATIONS OF
THE FEDERAL POWER COMMISSION
CONCERNING THE TRANSPORTATION OF
ALASKAN NATURAL GAS

U.S. DEPARTMENT OF STATE
FEDERAL ENERGY ADMINISTRATION
DEPARTMENT OF DEFENSE
THE NATIONAL SECURITY COUNCIL
THE DEPARTMENT OF THE TREASURY

JULY 1, 1977

INTRODUCTION

The Alaska Natural Gas Transportation Act of 1976 (PL 94-586) required the Federal Power Commission (FPC) to submit to the President by May 1, 1977, a recommendation concerning selection of a transportation system to carry natural gas from the North Slope of Alaska to the lower 48 states. The Act also authorized Federal agencies to comment upon the Federal Power Commission's recommendation by July 1, 1977.

On May 2, 1977 the Commission recommended selection of an overland route through Canada, provided such a route were made available by the Government of Canada on acceptable terms and conditions. The following report discusses the U.S.-Canada international relations aspects of selection of a pipeline route through Canada to carry Alaskan natural gas to the lower 48 states.

FPC CONCLUSIONS AND RECOMMENDATIONS

The initial decision on the transportation of Alaskan natural gas, prepared by Administrative Law Judge Litt, and issued by the FPC on February 1, 1977, contains a chapter on Canadian issues. The main points of the chapter are:

- Just, reasonable and non-discriminatory provincial treatment of transit pipelines is provided for under the Canadian constitution
- The applicants agree that ratification of the US-Canada Transit Pipeline Agreement will not end negotiations with Canada
- It is assumed that early development of known hydrocarbons reserves is as important to Canada as to the U.S.
- It is unlikely that native claims will significantly modify the Canadian Government's energy decisions
- Arctic Gas and Alcan argued that a joint project through Canada is not dependent upon a U.S.-Canada treaty. However, a treaty would regularize and simplify the procedures for obtaining joint approvals
- the treaty, which spells out reasonable practices of ordinary good business, does not add substantially to the expectation that a relationship which has been historically workable will remain workable
- It is expected that amendments to the treaty will be required and made from time to time
- If a pipeline for Alaskan gas is built across Canada, it is reasonable to assume that the Government of Canada will have an interest in promoting the pipeline's economic viability.

On May 2, 1977, the Federal Power Commissioners recommended that the President select an overland transportation system through Canada, if such a route is made available by the Government of Canada on acceptable terms and conditions. In their analysis, the commissioners confined themselves for the most part to US issues. Only two issues related to US-Canadian international relations were mentioned:

- In reference to the "western leg" of the Arctic Gas Project, the FPC said that if Canadian gas exports to the US are terminated upon expiration of present licenses, sufficient idle pipeline capacity will be available to move Alaskan gas to the West Coast without construction of the western leg.
- Arctic Gas and Alcan will have similar socio-economic impacts in Canada. Total population and employment changes will not be great. The major impact will be on the traditional life-style of native communities along the pipeline right-of-way.

POSITIONS OF THE PARTIES

The Federal Power Commission heard evidence concerning 1) US-Canadian relations, 2) the Canadian decision process, 3) Canadian constitutional law.

The briefs submitted by the three applicants on the US-Canadian issues involved in transporting Alaskan gas across Canada covered security, taxation, and political factors. El Paso emphasized the uncertainties and compromises inherent in dealing with a foreign government. Arctic Gas and Alcan argued that the Government of Canada would have an interest in the success of a commercial venture for the transportation of Alaskan gas which involves Canadian companies. Canada would therefore be unlikely to take action contrary to the interests of its own citizens. In addition, the US and Canada have a long tradition of successful cooperation which can reasonably be expected to continue in the case of a transportation system for Alaskan gas.

The Federal Power Commission also heard evidence concerning the Canadian decision process on the pipeline. The argumentation focused on the settlement of native claims along the proposed pipeline rights-of-way. El Paso pointed out the problems involved in the settlement of native claims along the rights-of-way of Arctic Gas and Alcan. El Paso expressed the opinion that the Government of Canada's failure to settle the claims could delay a trans-Canadian pipeline decision for years.

Alcan argued that the claims problem is less serious along its proposed right-of-way in the southern Yukon than along the Arctic Gas route in the Mackenzie Valley.

The Commission also heard several days of testimony on Canadian constitutional law. El Paso's witnesses described the powers exercised by the Canadian provinces and implied that the provinces could delay or prevent construction of a transit pipeline, or could impose intolerable tax burdens.

Arctic Gas and Alcan witnesses argued that Canadian constitutional law confers upon the Federal Government of Canada unquestionable authority to implement a decision in favor of a transit pipeline.

RELEVANT FACTORS

Canadian Decision Process

The Government of Canada has been studying the proposals for the transportation of Alaskan natural gas across its territory since 1974. Separate studies are being conducted by the National Energy Board (NEB), the Berger Commission, the Alaska Highway Gas Pipeline Inquiry Board, and the Alaska Highway Gas Pipeline Environmental Assessment and Review Panel.

The National Energy Board is analyzing the relationship of the Canadian Arctic Gas, the Alcan, and the Mapleleaf projects to Canada's energy needs. The Board must determine whether any of the pipeline projects are and will be required by the present and

future public convenience and necessity. The Board's findings will be submitted to the Government of Canada for its consideration in early July. The Canadian Cabinet may accept or reject the NEB's decision on a pipeline, but may not change it except by legislation.

The Berger Commission is looking into the social, economic and environmental impact of the Canadian Arctic Gas and Mapleleaf Pipeline projects in the Yukon and Northwest Territories. The Commission released the first part of its report on May 9, 1977. It recommended that no pipeline be built across the Northern Yukon, and that ten years elapse before a pipeline is built in the Mackenzie River Valley. Part II of the report, recommending terms and conditions to be applied in the event that a pipeline is built, is expected later during the summer of 1977. The report is not binding on the Government of Canada and does not address all the factors which the Canadian Government will consider before reaching a final decision.

The Alaska Highway Gas Pipeline Inquiry Board will report on the social and economic aspects of the Alcan project in the southern Yukon. The report is to be submitted to the Canadian Cabinet by August 1, 1977.

The Alaska Highway Gas Pipeline Environmental Assessment and Review Panel, directed by Dr. H.M. Hill, is analyzing the environmental impact of the Alcan project in the Yukon. Dr. Hill's report is to be completed by August 1.

On April 28, 1977, Canadian Prime Minister Trudeau appointed Mr. Basil Robinson as Northern Pipeline Commissioner. Mr. Robinson will coordinate the activities of the various agencies of the Canadian Government in reaching a decision, and will be the Canadian Government's point of contact with the US Government as the two decision-making processes unfold.

All inputs related to the pipeline decision required by the Government of Canada are expected to be at hand by early August, 1977. The Canadian parliament is expected to debate the pipeline issue in July, before the Canadian Government makes its decision, and again in August.

Commenting upon the timing of the Canadian decision, Canadian Prime Minister Trudeau, during his visit to Washington in February, 1977, indicated that Canada would make a determined effort to accommodate to the anticipated U.S. decision timetable.

Settlement of Native Claims

It is the policy of the Federal Government of Canada to recognize the existence of a native interest in those areas of Canada in which the native interest has not been settled by treaty or superseded by law. The Government of Canada believes it is desirable to address the native claims issue expeditiously and, if at all possible, before a pipeline is built. However, the Government of Canada has never taken the position that it is necessary to reach a settlement before hand. It is expected that the Government of Canada will reach a decision on the pipeline issue within the anticipated US timetable, regardless of the status of the settlement of native claims. Moreover, if the U.S. and Canada agree to cooperate on a gas pipeline, that agreement would have to be based on an understanding that construction can be carried out expeditiously. Construction would not, therefore, be delayed by the settlement of native claims which could, if necessary, go forward concurrently.

Canadian Legal Environment

Two procedures exist for seeking review of an NEB decision related to the gas pipeline. First, Section 18 of the NEB Act permits parties to NEB proceedings to appeal questions of law or jurisdiction to the Federal Court of Appeals of Canada. Such appeals are discretionary for the Court; a court must grant leave to appeal. An application for appeal must be filed within one month of the NEB's action, unless the court or a judge finds that special circumstances allow some longer time. Once leave is granted, the appeal must be entered within 60 days.

We are informed by Canadian authorities that there should be no plausible challenge to the jurisdiction of the NEB or any significant question of law arising

from its decisions. Section 44 of the NEB Act gives the NEB broad discretion in deciding on applications of public convenience and necessity for pipelines.

Judicial review of NEB action would more likely be sought under the Federal Courts Act. Under that Act, the NEB could be overturned if it "failed to observe a principle of natural justice", "acted beyond or refused to exercise its jurisdiction", "erred in law in making its decisions", or "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it".

We understand that the Canadian courts have left great discretion to the administrative board or body involved. We know of no case in which an NEB decision to issue a certificate of public convenience and necessity has been effectively challenged in the courts.

It should also be noted that Canadian law places comparatively stringent limits on standing to sue. We understand that, in general, only parties to Administrative proceedings can seek judicial review of agency action.

Under Canadian law, the scope of review of NEB decisions is narrower than comparable review of the decisions of US regulatory agencies.

If the Federal Government of Canada makes a decision in favor of an overland route for Alaskan gas, no further provincial permits are required. The successful applicant will be authorized to proceed in acquiring land for the pipeline right-of-way through normal commercial contract negotiations. If necessary, the Federal Government of Canada will exercise the right of eminent domain to assure that a right-of-way can be obtained.

Implementation of a Canadian decision in favor of a trans-Canadian gas pipeline will require a permit from the Department of Indian and Northern Affairs to allow use of federally-owned land in the Yukon and Northwest Territories. However, it is expected that issuance of such a permit would be pro forma if a favorable decision is reached by the Federal Government of Canada.

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The Canadian procedures for implementing a decision on the gas pipeline appear to be less complicated than procedures in the US, where state approvals are required for right-of-way acquisition, exploitation of mineral resources, and construction of port and regasification facilities. Delays related to approval by regulatory authorities are less likely to occur in Canada than in the U.S.

US-Canada Transit Pipeline Agreement

The Trans-Alaska Pipeline Authorization Act of 1973 (PL 93-153) authorized and requested the President to determine whether the Government of Canada would be willing to permit the construction of pipelines across Canada to carry oil and gas from Alaska's North Slope to markets in the lower 48 states and terms and conditions which might apply to such a pipeline. In response to this Congressional mandate, the Department of State began negotiations in 1974 which led to the Transit Pipeline Agreement signed on January 28, 1977. The President sent the Agreement to the Senate on March 30, 1977, for advice and consent to ratification. The Senate Foreign Relations Committee held hearings on June 7, 1977, and its report is expected to be complete in July. The Agreement includes the following basic elements:

- It covers all existing or future pipelines which transit the territory of each party;
- It covers all forms of hydrocarbons including crude oil, petroleum products, natural gas, petrochemical feedstocks and coal slurries;
- It provides for reciprocity of obligations on the part of both parties;
- It does not provide for approval of any specific proposals to construct a transit pipeline across the territory of either country, but it makes provision for possible protocols on specific pipeline projects if they are deemed necessary;

- It provides a guarantee of throughput, by which public authorities in both countries are prohibited, except under specified emergency circumstances, from interfering with or impeding hydrocarbons moving in transit pipelines;
- It provides for non-discriminatory treatment of hydrocarbons transiting either country, which ensures that public authorities in both countries will be prevented from discriminating against transit pipelines with regard to taxes and other monetary charges;
- It assures "in bond" treatment for hydrocarbons moving in transit pipelines;
- It confirms the jurisdiction of normal regulatory authorities over transit pipelines and requires that their action be reasonable and non-discriminatory;
- It provides for equitable sharing of pipeline capacity in the event of emergencies on a pre-determined basis.
- It provides for binding arbitration in the event of disputes which cannot be resolved by negotiation; and
- It is of long duration -- thirty five years -- and may be terminated after the end of this period only if ten years prior notice is given.

The Agreement provides very strong assurances of non-interference with the flow of hydrocarbons in transit. Even in emergency situations, the Agreement spells out the terms governing the operation of pipelines carrying hydrocarbons in transit commingled with indigenously-produced hydrocarbons. Both the U.S. and Canada recognize that security of throughput is a fundamental requirement, and both countries have made binding, reciprocal commitments to non-interference.

The Agreement does not bar real property taxes by either provinces or states. However, under the provisions of the British North American Act and the terms of the Agreement, the provinces would be pre-

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vented from taxing the throughput of pipelines or levying discriminatory charges on transit pipelines. The Federal Government of Canada has accepted the obligation to ensure that the exercise of the taxing power of the provinces shall be applied in a non-discriminatory manner.

In the U.S., where a ratified treaty becomes the supreme law of the land, the U.S. Federal Government has the authority to prevent states from discriminating against transit pipelines and is committed to do so by the Agreement.

Whether discrimination against a transit pipeline exists is determined by comparison with similar pipelines. The Agreement provides that "similar" pipelines include both inter-provincial and inter-state pipelines and intra-provincial and intra-state pipelines. This definition is sufficiently broad to assure that an adequate basis for comparison can be found within the jurisdictions which would be involved if a trans-Canadian route for Alaskan gas is approved.

The hydrocarbons moving through a transit pipeline are accorded the equivalent of "in bond" treatment under the terms of the Agreement and may not be taxed by provincial, state, or Federal authorities in either country.

The non-discrimination protections contained in the Agreement prevent the imposition of taxes on transit pipelines which are not also applicable to similar, non-transit pipelines. Therefore, the Agreement assures that transit pipelines will not be taxed in a discriminatory manner to generate funds for the settlement of native claims.

The U.S.-Canada Transit Pipeline Agreement does not settle all issues related to a trans-Canadian pipeline for Alaskan natural gas. Rather, the Agreement provides fundamental guarantees and a framework for the terms and conditions which would be applicable. If Canada decides to offer an overland route, further discussions with the Government of Canada will be needed to answer specific questions related to financing arrangements, pipeline tariffs, expansion of the pipeline's capacity, requirements for purchasing goods and services in Canada, the possibility of construction delays, and arrangements for inspection of the pipeline.

Financing

The question of financing a trans-Canadian pipeline for Alaskan gas has not been formally discussed with the Government of Canada. If an overland route is offered by Canada, and if it is necessary for either Government to participate in financing, financial arrangements could be dealt with in a protocol to the U.S.-Canada Transit Pipeline Agreement.

Impact on U.S.-Canadian Relations

The U.S. and Canada have a long tradition of cooperation on mutually beneficial projects, such as the Saint Lawrence Seaway, the Alaskan Highway, the environmental clean-up of the Great Lakes, and the transportation of Canadian hydrocarbons across the U.S. A decision to construct a trans-Canadian pipeline for Alaskan natural gas would be in keeping with this cooperative tradition which is in the interest of both countries. However, both Governments have made clear that a decision on the gas pipeline will be made on its own merits.

Regardless of the outcome of the gas pipeline decision, a community of interest will remain, tending to draw the US and Canada together. A relationship which is basically friendly and cooperative will continue.

Canadian Transit Pipelines in the US

Most of Canada's oil and natural gas reserves are located in the western provinces of Alberta, Saskatchewan, and British Columbia. However, energy consumption is greatest in the industrialized, eastern provinces of Ontario and Quebec.

Canadian crude oil moves from the producing provinces in the west to the consuming provinces in the east via the Interprovincial Pipeline System. The two branches of the Interprovincial system transit the U.S.; one north of Lake Michigan, and the other to the south of the Lake.

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Canadian natural gas is carried from west to east via the TransCanada/Great Lakes Gas Transmission system. The system transports about 300 billion cubic feet of gas per year across the US to markets in eastern Canada. In addition, TransCanada/Great Lakes delivers Canadian gas to US markets in the Midwest.

Imported crude oil is carried via a transit pipeline from Portland, Maine to Montreal. In 1976, 300 thousand barrels per day of crude oil were delivered to Montreal through the Portland pipeline.

CONCLUSION

It is the conclusion of the Task Force on International relations that a viable option exists for the transportation of Alaskan natural gas across Canada, provided that the Government of Canada offers an overland route across its territory. A trans-Canadian gas pipeline would benefit from the protection afforded by the US-Canada Transit Pipeline Agreement, and from the long tradition of cooperation between the two countries.

Canadian constitutional law provides clear authority to the Federal Government of Canada to make and implement a decision concerning a transit pipeline for Alaskan gas. In addition, the Government of Canada has accepted the obligation to ensure that the exercise of the taxing power of the provinces shall be applied in a non-discriminatory manner.

The Task Force agrees with Federal Power Commission Administrative Law Judge Litt that in light of the history of successful cooperation with Canada in other areas, it is reasonable to expect the Government of Canada to act responsibly in the case of a pipeline carrying Alaskan gas.

The Task Force further concludes that regardless of the outcome of the gas pipeline decision, U.S.-Canadian relations will continue to be friendly and cooperative.