ALBERTA ENERGY AND UTILITIES BOARD

Edmonton, Alberta

DECISION U97140

re:

NOVA GAS TRANSMISSION LTD.

4 December 1997
TABLE OF CONTENTS

TABLE OF CONTENTS .......................................................... 1
PARTIES PARTICIPATING IN THE PROCEEDINGS .......................... 2
ABBREVIATIONS .................................................................... 3
1. INTRODUCTION ................................................................. 4
2. NGTL’s APPLICATION ....................................................... 6
3. GROUNDS FOR REVIEW ADVANCED BY NGTL AND FOOThILLS .... 8
4. OTHER PARTIES’ POSITIONS ............................................ 17
5. BOARD FINDINGS ............................................................. 22
PARTIES PARTICIPATING IN THE PROCEEDINGS

Small Explorers and Producers Association of Canada/
Canadian Association of Petroleum Producers (SEPAC/CAPP)
Mr. A. L. McLarty

NOVA Gas Transmission Ltd. (NGTL)
Mr. R. A. Reaburn
Mr. F. Foran

Foothills Pipe Lines Ltd. (Foothills)
Mr. P. Cochrane
Ms. S. Milutinovic

Southern California Edison Company (Edison)
Mr. L. Keough

4 December 1997
Decision U97140

ABBREVIATIONS

ANG Alberta Natural Gas Company Ltd.
Board Alberta Energy and Utilities Board
CAPP Canadian Association of Petroleum Producers
Contract Service Agreement Firm Service for Transportation of Gas, dated May 5, 1994 between Foothills Pipe Lines Ltd. and NOVA Corporation of Alberta
Edison Southern California Edison Company
Foothills Foothills Pipe Lines Ltd.
Foothills (Alta.) Foothills Pipe Lines (Alta.) Ltd.
NEB National Energy Board
NGTL NOVA Gas Transmission Ltd.
NOVA NOVA Corporation of Alberta (NOVA Gas Transmission Ltd as of May 11, 1994)
Operating Operating Agreement dated April 23, 1980 between Foothills Pipe Lines(Alta.) Ltd. and the Alberta Gas Trunk Line Company Limited.
Pan-Alberta Pan-Alberta Gas Ltd.
PUB Public Utilities Board
SEPAC Small Explorers and Producers Association of Canada
WAML Western Alberta Mainline

4 December 1997
1. INTRODUCTION

The Small Explorers and Producers Association of Canada (SEPAC) complained to the Public Utilities Board (the PUB) by letter dated June 21, 1994 (the Complaint) that the rates, tolls and charges effective November 1, 1993, as fixed by NOVA Gas Transmission Ltd. (NGTL) for the transportation of natural gas, were unjust and unreasonable. The Complaint was made in respect of NGTL’s notification to its customers and interested parties on April 28, 1994 that NGTL would contract for 540 MMcf/d of capacity with Foothills Pipe Lines Ltd. (Foothills). NGTL’s Firm Service Agreement for Transportation of Gas, dated May 5, 1994 (the Contract) was to be effective November 1, 1993 and allowed NGTL to utilize capacity on Foothills’ Zone 7 facilities.

Pursuant to section 8(2) of the Alberta Energy and Utilities Board Act, the Complaint to the PUB was continued before the Alberta Energy and Utilities Board (the Board). In Decision E95079 dated July 28, 1995, the Board found that NGTL should have pursued more prudent contractual arrangements and concluded that imposition of the costs of the Contract on NGTL’s customers resulted in rates which were not just and reasonable. The Board ordered NGTL to refund to customers all tolls, rates or charges which were collected from November 1, 1993 to December 31, 1994 to fund the charges arising from the Contract.

On September 20, 1995, NGTL applied, under section 56 of the Public Utilities Board Act (PUB Act) for review and variance and on September 29, 1995 for suspension of operation of Decision E95079. In its application for suspension of operation, NGTL stated that, if it made a refund in accordance with Decision E95079, there was a significant risk that the refund, or part thereof would not be recoverable, if it was ultimately determined that NGTL should not have been required to make the refund. NGTL stated that the risk arose because its customers and contract demands had changed since the period covered by the Decision E95079 proceeding. In addition, the change to full regulation created uncertainty with respect to the Board’s powers to make adjustments and customers’ legal obligations in respect of the period prior to full regulation.

In its review and variance application, NGTL submitted that the Board, in Decision E95079, made a fundamental finding that NGTL’s Western Alberta Mainline (WAML) and Foothills’ Zone 7 system have constituted an integrated system since 1981. Having made this fundamental finding, the Board should have treated the Zone 7 system as an integral part of the NGTL system and analyzed the allocation of costs among all the shippers using the integrated system. NGTL further submitted that the Board erred in its conclusions on each of three significant reasons supporting the finding in Decision E95079 that NGTL was obligated to pursue more prudent contractual arrangements. NGTL submitted that the Board erred in law and jurisdiction by not determining just and reasonable rates and varying NGTL’s rates, tolls and charges accordingly.

4 December 1997
By letter dated October 5, 1995, SEPAC/CAPP stated that they did not accept or necessarily agree with the reasons advanced by NGTL in support of the application for suspension of operation. However they would not oppose the application for suspension of operation, provided that a refund, including interest, would be made in a timely manner following disposition by the Board of NGTL's review and variance application.

On October 16, 1995, the Board informed interested parties to the Decision E95079 proceeding of the procedures and schedule for dealing with the applications by NGTL.

In respect of the application for suspension, the Board noted NGTL's submission that the probability of prejudice to NGTL in making a refund was greater than any prejudice that might be suffered by its customers if Decision E95079 were suspended pending the outcome of the review and variance application. Accordingly, the Board advised the parties that operation of Decision E95079 was suspended pending disposition of NGTL's application for review and variance.

In a written proceeding, the Board received submissions and arguments on whether to review Decision E95079 from NGTL, SEPAC/CAPP, Southern California Edison Company (Edison) and Foothills. The Board will now provide its Decision, with reasons, on whether to review Decision E95079.
2. **NGTL’s APPLICATION**

NGTL requested that the Board review Decision E95079 and vary the Decision and order to:

(a) Confirm the rates, tolls or other charges fixed by NGTL for the period from November 1, 1993 to December 31, 1994 and dismiss the Complaint.

(b) Alternatively, having found that NGTL’s shippers were using the Zone 7 system and that some allocation of the costs and benefits of capacity associated with the 1993 Alberta Expansion would have been fair, NGTL requested the Board to determine such allocation and the rates, tolls or charges that NGTL should have collected from its shippers to fund the payment of a just and reasonable share of the Zone 7 system costs and to vary the rates, tolls or charges fixed by NGTL for the period from November 1, 1993 to December 31, 1994 in accordance with such determination.

NGTL’s Application was made on the following grounds:

1. Having found that NGTL’s Western Alberta Mainline and the Zone 7 system constitute an integrated system, the Board erred by not assessing the prudence of the cost allocation resulting from the Contract against the cost allocation that would have been just and reasonable among shippers using the integrated system, being a cost allocation method corresponding or equivalent to the one used on the NGTL pipeline system which was well known to the Board.

2. NGTL submitted that the Board made the following errors of law and fact:

   (a) The Board erred by finding that Foothills received valuable benefits, in the absence of any contractual entitlement, entirely at the expense of NGTL’s shippers. In any event, this was an irrelevant consideration, which ignored the integrated nature of NGTL’s Western Alberta Mainline and the Zone 7 system.

   (b) The Board erred in its interpretation of the Operating Agreement.

   (c) The Board erred in its interpretation of Article 7.1 of NGTL’s General Terms and Conditions and Article 4.4 of the service agreement between Pan-Alberta Gas Ltd. (PAG) and Foothills by concluding that NGTL had certain rights which it could have exercised as leverage against Foothills. Even if the Board were
correct, it erred in concluding that the exercise of such rights would have been effective against Foothills.

(d) The Board erred by holding that NGTL’s shippers had no entitlement to receipt point pressures into the Zone 7 system resulting from the 1993 Alta. Expansion of NGTL’s Western Alberta Mainline. In any event, the entitlement to, or ownership of, the receipt point pressures or the ability to maintain them were irrelevant considerations which ignored the legal rights of Foothills (Alta.) and Foothills in respect of the Zone 7 system and the capacity of the Zone 7 system.

3. The Board erred by not proceeding to determine and fix the just and reasonable amount to be included in NGTL’s rates once it found that some allocation to NGTL shippers of the cost of the Zone 7 system would have produced just and reasonable rates.1

NGTL submitted that an applicant, in an application for review and variance, had the onus to satisfy the Board that a review was warranted. At the first stage of the proceedings, the applicant should present an arguable case that the Board might have erred in a conclusion, which, if corrected, would have materially affected the Decision. At the second stage, the applicant was required to show that the existence of an error of law or fact was obvious, or that it existed on the balance of probabilities. NGTL submitted that any false or mistaken conception or application of the law constituted an error of law, which would be reviewable by an expert tribunal such as the Board. It would be sufficient to demonstrate that the Board’s approach did not fulfil its statutory mandate. NGTL stated that the purpose of the Board’s fourth criterion2 was to maintain an unfettered discretion that would allow it to review any case where the circumstances warranted. Therefore, NGTL submitted, an applicant was not confined to any rigid set of defined circumstances.

1Application, pp.6-7
2The Board’s criteria for granting a review are set out on p.32 of this Decision.
3. GROUNDS FOR REVIEW ADVANCED BY NGTL AND FOOTHILLS

(a) NGTL's Ground I

NGTL stated:

Having found that NGT's Western Alberta Mainline and the Zone 7 system constitute an integrated system, the Board erred by not assessing the prudence of the cost allocation resulting from the Contract against the cost allocation that would have been just and reasonable among shippers using an integrated system, being a cost allocation method corresponding or equivalent to the one used on the NGT pipeline system which was well known to the Board.3

NGTL submitted that this error met the Board’s second review criterion. In addition, this ground for review was particular to the unique circumstances of the case and therefore met the Board’s fourth criterion. The Board made a fundamental finding that NGTL’s WAML and Foothills’ Zone 7 facilities constituted an integrated system. The Contract between NGTL and Foothills related to the use and allocation of the costs of an element of the integrated system, and did not add any incremental contract demand.

NGTL submitted the Board had erred in ignoring the real issue: whether the Contract produced a just and reasonable allocation of the Zone 7 cost of service among all shippers using the integrated system. All shippers’ gas was commingled and all components of the system were used to transport the gas to the Alberta/B.C. border. Accordingly, the Board should have compared the cost allocation produced by the Contract to an allocation similar to that on the NGTL system. Such an allocation, based on the total delivery contract demand at the Alberta/B.C. border would result in shippers receiving the same service paying the same proportion of the entire cost of service.

NGTL stated that its shippers paid approximately 69.2% of Foothills’ Zone 7 system cost of service. Under the “integrated system” allocation, NGTL shippers would have been responsible for 90.2% of the WAML/Zone 7 system costs, therefore, the Contract produced a more favourable result for NGTL shippers. Having regard to the hydraulic capacity of the Zone 7 system, the Contract produced a just and reasonable allocation of the Zone 7 system cost of service.

NGTL stated that the result of the Board’s findings with respect to integration and use of the system by shippers was that ownership became irrelevant to determining just and reasonable rates.

3Application, p.8

4 December 1997
Decision U97140

The Board was required by its statutory mandate and by regulatory principles to assess the rates, tolls and charges to be borne by shippers using the integrated system. NGTL stated that it had identified its regulatory regime and its transition to full regulation under the Gas Utilities Act as unique circumstances in this case. In respect of the period prior to regulation under the Gas Utilities Act, its remedies were limited to review or appeal of Board orders. Under the Gas Utilities Act, it was doubtful whether NGTL could adjust current rates to reflect the rates ultimately determined by the Board in respect of a prior period.

(b) NGTL's Ground II(a)/Foothills' Error 1

NGTL and Foothills stated the Board erred in fact and law:

... by finding that Foothills received valuable benefits, in the absence of any contractual entitlement, entirely at the expense of NGT’s shippers. In any event, this is an irrelevant consideration, which ignored the integrated nature of NGT’s Western Alberta Mainline and the Zone 7 system.4

The Board erred in its finding that Foothills received a benefit as a result of the Firm Service Agreement for Transportation of Gas dated May 5, 1994 (the “Contract”) between NGT and Foothills.5

NGTL submitted there was no evidence to support the Board’s conclusion that Foothills obtained a benefit from the Contract. Foothills was a federally regulated cost of service company, and the cost of service was not changed by the Contract. The effect of the Contract was to allocate, through Foothills’ rates and NGTL’s rates, the Zone 7 costs among the common shippers using the integrated system.

NGTL submitted that the Board had limited its focus to benefits that might have accrued to Foothills such as pressure entitlements, payment for compression, sharing of the construction and cost of the 1993 Expansion. Fundamentally, the Board had ignored the allocation of costs to shippers and its statutory duty to fix just and reasonable rates. If Pan-Alberta and NGTL shippers did not share Zone 7 costs on an “integrated” basis, the result would be discriminatory for Pan-Alberta.

The Board had not recognized that, in addition to its service agreement with Foothills, Pan-Alberta contracted directly with NGTL for full transportation service including compression

4 Application, p.13
5 Foothills Argument, p.2

4 December 1997
costs. A compression contract would have reallocated compression costs so that Pan-Alberta would have assumed a greater share than other shippers receiving similar service. It would not have been reasonable for Foothills to contract with NGTL for compression service on behalf of Pan-Alberta.

NGTL stated the Board should have compared the allocation of compression costs on the integrated system to the allocation that occurred in British Columbia. Reciprocal service agreements between Foothills and Alberta Natural Gas Company Ltd. (ANG) resulted in Pan-Alberta, as a shipper on the integrated system in British Columbia, bearing its just and reasonable share of compression costs. The effect of the Contract was to produce a substantially similar result in Alberta as in British Columbia.

NGTL stated that the exhibits provided concerning the B.C. contracting arrangements summarized evidence demonstrating that a compression contract was unnecessary. Had the Board carried out its statutory duty in these matters, it would have concluded that NGTL’s shippers were not overpaying Zone 7 costs.

Foothills submitted that no party questioned the increase in capacity. Foothills’ cost of service did not change. Rather than one shipper paying, the effect of the Contract was to allocate the Zone 7 cost of service between two shippers on a volume-distance basis. Foothills treated NGTL as it would any other shipper. By finding that there was a benefit to Foothills, the Board concluded in error that the Contract was not an arm’s-length transaction.

(c) NGTL’s Ground II(b)/Foothills’ Error 2

NGTL and Foothills stated the Board erred in fact and law:

\[\ldots\text{ in its interpretation of the Operating Agreement.}\]

NGTL noted that the Board had interpreted the provisions of the Operating Agreement dated April 23, 1980 between Foothills Pipe Lines (Alta.) Ltd. and the Alberta Gas Trunk Line Company Limited (“the Operating Agreement”) to obligate Foothills to pay some portion of the cost of the Expansion. NGTL submitted that the Board’s interpretation was not consistent with the context of the entire Operating Agreement and the surrounding circumstances. Clause 2.2 of the recitals and definitions of the Operating Agreement specified that the services to be performed were only those relating to day-to-day operations and maintenance. Therefore, Clause 5.2(c) of

\[^6\text{Application, p.17; Foothills Argument, p.2}\]

4 December 1997
the Operating Agreement could not be interpreted to extend to providing compression to make Foothills’ facilities operational.

The circumstances and interpretation of the Operating Agreement had not been raised in the proceedings by the Board or any party. The Operating Agreement did not contemplate that Foothills would compensate NGTL for additions to the system.

Foothills submitted that the Board’s interpretation was not supported by a reading of the Operating Agreement, which governed only the day-to-day physical operation and maintenance of the facilities. In response to SEPAC/CAPP, Foothills submitted that both parties to the Agreement shared an interpretation which was not consistent with that of the Board. This demonstrated, in Foothills’ opinion, that the Board’s interpretation was in error.

(d) NGTL’s ground II(c)

NGTL stated the Board erred in fact and law:

... in its interpretation of Article 7.1 of NGT’s General Terms and Conditions and Article 4.4 of the Service Agreement between PAG and Foothills by concluding that NGT had certain rights which it could have exercised as leverage against Foothills. Even if the Board were correct, it erred in concluding that the exercise of such rights would have been effective against Foothills.7

NGTL noted the following statement of the Board:

The Board considers that NGT could have required Pan-Alberta to increase its delivery pressure up towards the 845 psi at any of the three receipt points into which Foothills delivers Pan-Alberta’s gas into the NGT system. Such a move would have forced Foothills to add compression equipment at the expense of its only customer, Pan-Alberta. Such compression, if properly planned for, would also have added to the capacity of the NGT system, just as the 1993 NGT Expansion has added to Foothills’ capacity.8

NGTL referred to Article 4.4 of the Service Agreement for Transportation of Gas dated April 23, 1980 between Foothills Pipe Lines (Yukon) Ltd. and Pan-Alberta Gas Ltd (“the Foothills/Pan-Alberta Service agreement”), which specifies required delivery pressure as follows:

7Application, p.20
8Decision E95079, p.31

4 December 1997
The delivery pressure of the gas tendered by Shipper to Company for transportation shall be at a pressure sufficient to enter Company’s system at the Receipt point, up to that specified for such Receipt point in Appendix A attached to this Service Agreement.

NGTL also referred to Article 7.1 of its General Terms and Conditions of Service:

... the pressure of the gas tendered by Customer to Company at any Receipt Point shall be the pressure, up to the Maximum Receipt Pressure, that the Company requires such gas to be tendered, from time to time at that Receipt Point.

NGTL submitted that it could not have required Pan-Alberta or any other shipper to increase its delivery pressure. Such a requirement would have been arbitrary and for a purpose not related to the operation of the system. NGTL submitted that the Board erred in concluding that the points of interconnection between NGTL’s and Foothills’ system constituted receipt points and delivery points under the Foothills/Pan-Alberta Service Agreement.

NGTL submitted that even if it had the legal right to assert the “leverage” alleged by the Board, the Board also erred in concluding that the exercise of that right would have been effective against Foothills. NGTL stated that as the owner of the Zone 7 system, Foothills (Alta.) was legally entitled to whatever capacity might be created in Zone 7, whether that capacity was created by the 1993 Expansion or not. Under NGTL’s General Terms and Conditions, NGTL’s shippers were entitled to delivery pressure from NGTL’s system. Based on the integrated design, the delivery pressure from the WAML into the Zone 7 system were sufficient to operate the system at contracted/design capacity.

(e) NGTL’s Ground II(d)/Foothills’ Error 3

NGTL and Foothills stated the Board erred in fact and law:

... by holding that NGT’s shippers had no entitlement to receipt point pressures into the Zone 7 system resulting from the 1993 Alta. Expansion of NGT’s Western Alberta Mainline. In any event, the entitlement to, or ownership of, the receipt point pressures or the ability to maintain them were irrelevant considerations which ignored the legal rights of Foothills (Alta.) and Foothills in respect of the Zone 7 system and the capacity of the Zone 7 system.9

---

9Application, p.23

4 December 1997
... in its conclusion that Pan-Alberta Gas Ltd. had no entitlement to pressure at delivery points into the Foothills facilities.  

NGTL submitted that, if the points of interconnection between the NGTL and the Foothills’ system constituted “delivery points”, the Board erred in its conclusion that NGTL’s shippers had no entitlement to receipt point pressures into the Zone 7 system. NGTL noted that Article 7.3 of NGTL’s General Terms and Conditions specified delivery pressures as follows:

... the pressure of the gas delivered by Company at any Delivery Point shall be the pressure available from the Facilities at that Delivery Point, provided that such pressure shall not exceed the Maximum Delivery Pressure.

NGTL and Foothills maintained that this Article obligated NGTL to deliver gas at the pressure available from the system. Shippers were entitled to whatever benefits arose from whatever the delivery point pressure might be.

NGTL believed the Board erred in failing to recognize that as the owner of the Zone 7 system, Foothills (Alta.) was legally entitled to the benefit of all the capacity in the Zone 7 system. Subject to regulation under the National Energy Board Act, Foothills had the legal right to use the incremental capacity. NGTL was required to enter into a contract with Foothills to obtain the rights to use that capacity. Whether Foothills’ or NGTL’s shippers owned or were entitled to the receipt point pressures which caused the incremental capacity was irrelevant.

NGTL argued that as it was pursuing its own business interests in undertaking the 1993 Alberta Expansion and Foothills did not need or request the Expansion, Foothills was not legally obligated to contribute to the costs. NGTL submitted that it was a “fundamental incident of the ownership of an asset that the owner is entitled to the enjoyment of the asset and the benefits flowing from the asset.”

According to Foothills, the Board’s conclusion also overlooked the fact that Pan-Alberta was a shipper on the NGTL Western Alberta Mainline to the Alberta/British Columbia border, paid NGTL’s full toll and was entitled to all of the rights of a shipper on NGTL. Foothills submitted that a contractual obligation existed in Article 7.3. of the General Terms and Conditions of Service for NGTL to deliver Pan-Alberta’s gas at the pressure available from the facilities. In response to SEPAC/CAPP, Foothills stated that the pressure available at a delivery point is a required minimum pressure.

(f) Foothills’ Error 4

10Foothills Argument, p.2

4 December 1997
Foothills stated:

The Board erred in finding that the contractual relationship between Foothills and Alberta Natural Gas Company Ltd. was “an agreement to share capacity costs and benefits on a reciprocal basis” and that the contractual relationship is a useful precedent in this instance.¹¹

Foothills submitted that the Foothills/ANG contract relationship came about as a result of the unique circumstances on Zone 8. Had the Board considered the different circumstances in each situation, it could not have come to the conclusion that the Zone 8 contractual relationship was applicable to Zone 7. ¹²

In response to SEPAC/CAPP, Foothills submitted that contracts existed which reflected the unique circumstances of Zone 7.

(g) NGTL’s Ground III/Foothills’ Error 5

NGTL and Foothills stated:

The Board erred by not proceeding to determine and fix a just and reasonable amount to be included in NGT’s rates once it found that some allocation to NGT shippers of the cost of the Zone 7 system would have produced just and reasonable rates.¹³

¹¹Foothills Argument, p.2
¹²The Foothills/ANG contract relationship is based on the following:
(a) Service Agreement for Transportation of Gas dated April 23, 1980 between Foothills Pipe Lines (Yukon) Ltd. and Pan-Alberta Gas Ltd. (“The PAG/Foothills 240 Service Agreement”).
(b) Service Agreement for Transportation of Gas dated May 15, 1992 between Foothills Pipe Lines Ltd. and Alberta Natural Gas Company Ltd. (“The ANG/FPL Expansion Service Agreement”).
(c) Service Agreement for Transportation of Gas dated April 23, 1980 between Foothills Pipe Lines (South B.C.) Ltd. and Foothills Pipe Lines Ltd. (“The Foothills/Foothills (South B.C.) Service Agreement”).
(d) Amending Service Agreement Applicable to Firm Transportation Service under Rate Schedule FS-1, dated July 1, 1991, between Alberta Natural Gas Company Ltd. and Foothills Pipe Lines (South B.C.) Ltd. (“The Foothills/ANG PAG 240 Service Agreement”).
(e) Service Agreement Applicable to Firm Transportation Service Under Rate Schedule FS-1, dated June 26, 1992, between Alberta Natural Gas Company Ltd. and Foothills Pipe Lines (South B.C.) Ltd. (“The Foothills (South B.C.)/ANG Expansion Service Agreement”).
¹³Application, p.25

4 December 1997
The Board erred by not applying its conclusion that it would be unjust and unreasonable for NGT’s shippers to use a portion of the capacity owned by Foothills without paying for the capacity used.14

NGTL submitted that this was an error of law that met the Board’s second review criterion. NGTL further submitted that its unique regulatory regime, the nature of the complaint, the Decision and the windfall to shippers constituted circumstances which met the Board’s fourth review criterion.

NGTL submitted that the Board had a statutory duty to fix just and reasonable rates for NGTL. Section 5(2) of the NOVA Corporation of Alberta Repeal Act, as amended, provided as follows:

[O]n complaint in writing of an interested party, the Public Utilities Board may, or on the direction of the Lieutenant Governor in Council shall, after notice to and hearing of the parties interested, determine the justness and reasonableness of the rates, tolls or other charges fixed or varied by NOVA and by order in writing may vary or confirm the rates, tolls or other charges.

NGTL submitted it was clear from the Decision that the Board had found some use of the Zone 7 system by NGTL’s shippers and that some sharing of costs would have been appropriate. For example the Board stated in its Decision that:

... it would be unjust and unreasonable for NGT’s shippers to use a portion of the capacity owned by Foothills without paying for the capacity used.15

NGTL stated its fundamental premise was “as the Board found the pipeline loops comprising the Zone 7 system and Western Alberta Mainline constitute an integrated system, it inevitably follows that NGTL’s shippers were using the pipeline loops”.

NGTL submitted that the Board’s jurisdiction was not limited by the Contract, as alleged by SEPAC/CAPP. The Board was not released from its statutory mandate to fix just and reasonable rates by its imposition of a reasonable contract standard. Having found the Contract to be imprudent, NGTL submitted that the Board erred by not proceeding to determine a just and reasonable amount to be included in NGTL’s rates. SEPAC/CAPP’s presentation of various cost allocation methodologies in the original proceeding indicated agreement that the Board’s mandate was not to treat this as an “all or nothing matter”. The Board’s disallowance of recovery under

14Foothills Argument, p.2
15Decision E95079, pp.33-34

4 December 1997
the Contract resulted in NGTL’s shareholders bearing the cost and shippers receiving millions of dollars of valuable services. This represented a windfall to shippers.

NGTL submitted that the regulation of its tolls prior to January 1, 1995 was unique. It could not initially seek regulatory approval of its rates. It could not apply to change the component of rates and tolls affected by a Board Order and its remedies were limited to review or appeal of that Order. NGTL’s transition to full regulation under the Gas Utilities Act was also unique. It was unclear whether NGTL would be able under its new method of regulation to charge its shippers to fund its fair share, as ultimately determined, of the Zone 7 cost of service for the period from November 1, 1993 to December 31, 1994. It was likely that current shippers and their respective contract demands differed from those of the period from November 1, 1993 to December 31, 1994. Intergenerational inequities would result as different shippers would fund a recovery than obtained a refund.

With respect to Edison’s jurisdictional argument, NGTL submitted that federal regulation of a component of the system did not relieve the Board of its duty to fix just and reasonable rates for the portion of the system subject to its regulation.

Foothills submitted that the Board failed to apply its own “just and reasonable” standard. No party disputed that the capacity grew by 540 MMcf/d. Under Foothills’ NEB-approved tariff, this capacity could not be used except under a transportation contract. Foothills submitted that the Board erred by not applying its conclusion that it would be unjust and unreasonable for NGTL’s shippers to use a portion of the capacity owned by Foothills without paying for the capacity used. The effect of the Decision was that NGTL’s shareholders, rather than shippers, paid for the use of the Foothills’ capacity. Foothills submitted that this was a material error of fact and law.

In response to SEPAC/CAPP, Foothills stated that the basis for its position was the Board’s erroneous conclusion that there was no minimum delivery pressure entitlement for Pan-Alberta at points into the Foothills facilities. Hence, the Board had wrongly concluded that Foothills did not own the additional capacity on its system.

4 December 1997
4. OTHER PARTIES' POSITIONS

(a) The Approach to the Decision

SEPAC/CAPP submitted that NGTL must satisfy the Board that the errors it asserted were either obvious or existed on the balance of probabilities. Materiality was relevant in considering whether a review was warranted and whether a need for variance had been substantiated.

According to SEPAC/CAPP, an error of law might be a conclusion based on no evidence, or a decision that was patently unreasonable. SEPAC/CAPP submitted that NGTL did not allege any such error of law. SEPAC/CAPP further submitted that there were no facts that NGTL alleged the Board denied, or found contrary to the evidence, or without evidence.

(b) NGTL's Ground I

SEPAC/CAPP submitted that the Board had adopted an approach to determining the prudence of the Contract that differed from the equity approach advanced by NGTL. SEPAC/CAPP submitted that the Board was not obligated to accept NGTL's approach and the Board's non-acceptance of NGTL's approach did not constitute an error of law or of fact.

SEPAC/CAPP submitted that NGTL's submission was based on NGTL's belief that its shippers were using Zone 7 capacity owned by Foothills. In the original proceeding, that belief was not substantiated nor considered reasonable by the Board.

SEPAC/CAPP submitted that questions of ownership were not irrelevant to an integrated system. NGTL's ability to "conjure up a case more detrimental to its shippers" did not make the case it opted for just and reasonable. SEPAC/CAPP submitted that the prudence of NGTL's Contract was the issue in the proceeding. NGTL had not identified any new unique criteria for the Board to consider. SEPAC/CAPP submitted that NGTL's position had been heard and that this ground constituted a repetition of the propositions advanced by NGTL in the original proceeding.

Edison submitted that NGTL's "assertions" did not constitute errors of law or fact. The finding that Foothills' Zone 7 and NGTL's WAML were integrated for operational purposes did not bind the Board to allocate the costs of each system in a particular fashion. Edison stated that the allocation and recovery of Foothills' Zone 7 costs were under the jurisdiction of the National Energy Board (NEB). The Board would not have the jurisdiction indicated by NGTL over the tolls of the integrated system.

Edison submitted that there was no obligation on the Board to formulate an alternative proposal or solution for NGTL, having rejected NGTL's proposal.

4 December 1997
(c) NGTL’s Ground II(a)/Foothills’ Error 1

SEPAC/CAPP submitted that the relevant facts were:
- Foothills received valuable benefits.
- There was an absence of a contractual entitlement.

SEPAC/CAPP submitted that NGTL had not shown a factual error with respect to the lack of contractual entitlement.

SEPAC/CAPP disagreed with NGTL’s assertion that there were no benefits to Foothills. NGTL had not denied that capacity was valuable, but had stated that the value of the capacity accrued to Foothills’ shippers. SEPAC/CAPP submitted that benefits and costs relative to a utility accrued first to the utility. A regulator might determine that certain benefits and costs could be passed on to customers. The Board had determined that NGTL failed to establish that Foothills was entitled to a minimum delivery pressure and hence to the capacity increase. NGTL’s reasons why it would not have been just and reasonable for Foothills to contract for compression related to NGTL’s perception of what was equitable for Pan-Alberta. SEPAC/CAPP argued that the Board determined, and NGTL had not disputed, that that perception was irrelevant to the issue of the prudence of the Contract.

SEPAC/CAPP noted that clauses 21 and 22 of NGTL’s submission, and the related attachments, dealt with Pan-Alberta’s contracting arrangements with Foothills prior to and following the 1993 B.C. expansion. SEPAC/CAPP submitted that this part of NGTL’s application represented new evidence and NGTL was not requesting that its review application be considered as based on new evidence. Therefore, SEPAC/CAPP submitted this evidence should be disregarded.

SEPAC/CAPP submitted that Foothills (Alta.) and NGTL were related and were subject to the ownership control of NOVA Corporation. In a non arm’s-length relationship, it could not be assumed that each party would act in its own self-interest. Prior to the Contract, the available capacity in Zone 7 was 240 MMcf/d. After the Contract was established, the capacity had increased to 780 MMcf/d. Unless it was Foothills’ position that pipeline capacity had no value, the Contract implicitly resulted in a benefit being conferred on Foothills.

(d) NGTL’s Ground II(b)/Foothills’ Error 2

SEPAC/CAPP disagreed with NGTL that the wording of Clause 5(c) of the Operating Agreement precluded extending the Operating Agreement to the provision of compression. In SEPAC/CAPP’s view, to be operational, Foothills required the use of the pressure gradient or ability to maintain it as supplied by NGTL.

4 December 1997
NGTL had contended that its failure to seek compensation and Foothills to pay compensation provided evidence that Foothills was not required to compensate NGTL for compression services. SEPAC/CAPP submitted that NGTL’s position might be persuasive between parties acting at arm’s-length. However, the Board had determined that:

...“prudent contractual arrangements” for NGT would be consistent with those which two informed arms-length pipeline companies, acting reasonably, would have entered into, if they had been operating a pipeline under circumstances similar to those existing on the WAML.\(^\text{16}\)

SEPAC/CAPP stated that the original complaint was based on a concern that non-arm’s-length parties could manipulate contracts to potentially prejudice third parties. The Board had found, on the evidence, that Foothills was, and is, using NGTL facilities to maintain pressure. That conclusion was solely for the determination of the Board.

SEPAC/CAPP submitted that Foothills had argued, as distinct from producing evidence, that the Operating Agreement did not apply to the provision of transportation service, pressure service or pressure gradients. SEPAC/CAPP argued that the terms of the Operating Agreement, not Foothills’ perceptions of its intent, governed its application.

(e) NGTL’s Ground II(c)

SEPAC/CAPP submitted that NGTL’s application was based on the following conclusion of the Board:

NGT could have required Pan-Alberta to increase its delivery pressure up towards 845 psi at any of the three receipt points into which Foothills delivers Pan-Alberta’s gas into the NGT system.\(^\text{17}\)

NGTL had argued that this would be arbitrary and improper, but had not argued that this option was not available, hence that there was any error in the Board’s interpretation. SEPAC/CAPP submitted that NGTL had not demonstrated that the Board’s conclusion actually suggested or assumed arbitrary or improper conduct. The Board had stated:

...the Board is not convinced by the evidence NGT has provided in this proceeding that NGT was under contractual obligation or any other obligation to

\(^{16}\)Decision E95079, p.19
\(^{17}\)Decision E95079, p.31 (emphasis added)
deliver Pan-Alberta's gas or the gas of its other shippers to Foothills at any required minimum pressure...  

SEPAC/CAPP noted that NGTL had not taken issue with any of these findings or conclusions. SEPAC/CAPP submitted that arm’s-length parties would usually protect their interests. NGTL’s position was based on the assumption of Foothills’ entitlement to capacity, which the Board found on the evidence not to be substantiated. In SEPAC/CAPP’s view, there was ample justification for NGTL to have negotiated with Pan-Alberta to increase its delivery pressure towards 845 psi at any of the three receipt points at which Foothills delivers Pan-Alberta’s gas into the NGTL system. NGTL had alleged the Board erred in concluding that the points of interconnection of NGTL’s WAML and Foothills’ loops constituted receipt points or delivery points under the Foothills/Pan-Alberta’s Service Agreement. SEPAC/CAPP stated the Decision made no reference to such delivery points.

(f) NGTL’s Ground II(d)/Foothills’ Error 3

SEPAC/CAPP submitted that NGTL’s claim fell short of disputing the Board’s finding that neither Foothills nor NGTL shippers were entitled to or owned the receipt point pressures. NGTL had not indicated that it would found its request for review and variance on new material evidence. NGTL asserted legal rights of Foothills without evidence, such as a legal opinion to support its claim. SEPAC/CAPP submitted NGTL’s claim had not been proven on a balance of probabilities.

According to SEPAC/CAPP, Foothills’ paraphrase of the Board’s decision omitted reference to “required minimum pressure”. SEPAC/CAPP submitted that nothing in Article 7.3 of NGTL’s General Terms and Conditions could be read as requiring a minimum pressure.

(g) Foothills’ Error 4

SEPAC/CAPP agreed that the specific contract relationship on Zone 8 in southern British Columbia was the result of unique circumstances on Zone 8. SEPAC/CAPP submitted that the whole point was the existence of the contractual relationship between Foothills Pipe Lines (South B.C.) Ltd. and ANG before the business arrangements came into being.

---

18Decision E95079, p.30

4 December 1997
(h) NGTL's Ground III/Foothills' Error 5

SEPAC/CAPP submitted that NGTL’s third ground was based on a finding of use by NGTL shippers of the Zone 7 capacity owned by Foothills, and nothing in the Decision confirmed the finding alleged. In the proceeding, NGTL had fallen short of proving its assertion that Foothills owned the capacity. In the opinion of SEPAC/CAPP, no error was either obvious or shown to exist.

Even if the Board were to find use by NGTL shippers of Foothills’ Zone 7 capacity, SEPAC/CAPP did not agree that the Board would, as a result, be obliged to determine the amount to be included in NGTL’s rates, tolls or charges. NGTL was responsible for its own business affairs and the Board’s sole jurisdiction was to determine whether the costs of the Contract, whatever they might have been, could be passed on to NGTL’s shippers. NGTL had not made the Contract conditional on regulatory acceptance. Therefore, the Board was not left with any option to address the alternatives NGTL now suggested.

It appeared to SEPAC/CAPP that there were no costs to be shared, other than those established by the Contract and those costs were found to have been imprudently incurred. SEPAC/CAPP stated that disallowing imprudently incurred costs resulted in NGTL’s shippers paying what they should be paying. This did not constitute a windfall for shippers.

SEPAC/CAPP submitted that Foothills’ position was based on an assertion that the 540 MMcf/d of capacity increase belonged to or was owned by Foothills. That assertion was untenable and inconsistent with the Decision.
5. **BOARD FINDINGS**

The review and variance application was filed pursuant to section 56 of the PUB Act, which provides as follows:

56 The Board may rehear an application before deciding it, and may review, rescind or vary any order or decision made by it.

In dealing with applications made pursuant to section 56, the Board has established certain criteria which must be addressed before an application for review and variance will be granted. The criteria are:

(a) where new evidence, which was not known, or not available at the time evidence was adduced, and which may have been a determining factor in the decision, became known after the decision was made;

(b) where a decision is based on an error of law or fact, if such error is either obvious or is shown on a balance of probabilities to exist, and if correction of such error would materially affect the decision;

(c) where correction of a clerical error or clarification of an ambiguity is required; or

(d) where other criteria, particular to a given case, are shown to be valid.

In this first stage of review, the Board will consider whether there is an arguable case to review the Decision. Before granting a review based on criteria (b) or (d), the Board must also consider the probability that an error, if corrected, would have materially altered the Decision.

**NGTL's Ground I**

NGTL has submitted that the Board erred in not comparing the allocation of costs produced by the Contract to the allocation that results if Foothills’ costs were treated as part of the total costs of the integrated system.

The Board made a finding of fact that NGTL’s WAML and Foothill’s Zone 7 facilities were operationally integrated. However, in the Board’s view, this finding does not in any way bind the Board to assess whether the recovery of the costs of the Contract from NGTL’s customers would result in just and reasonable rates against the standard advanced by NGTL, namely, a particular method of cost allocation.

4 December 1997
Decision U97140

NGTL and Foothills own separate facilities; they offer transportation services under distinct tariffs; and they are under the jurisdiction of different regulators. Should either company require services from the other, a contractual arrangement is necessary. To determine whether or not the costs associated with the terms of the Contract should be recovered in NGTL’s rates, it was open to the Board to assess the prudence of the terms against a standard which it believed was appropriate to the circumstances of the case. The Board should review whether the action reflects what reasonable parties operating at arm’s-length would have done in light of the circumstances which were known or reasonably should have been known when the action was taken.

The Board considers that the criteria identified in NGTL’s Ground I have not been shown to be valid, therefore the Board dismisses this ground for review.

NGTL’s Ground II(a)/Foothills’ Error 1

NGTL and Foothills submit that the Board erred by finding that Foothills received valuable benefits, in the absence of any contractual entitlement, entirely at the expense of NGTL’s shippers.

Decision E95079 states:

The Board notes that under the Contract Foothills gains valuable capacity entirely at the expense of NGT’s shippers by using, without compensation, NGT facilities which Foothills requires to fulfil the Contract.\(^8\)

The Board considers the evidence to be clear that the facilities owned by Foothills do not constitute a stand-alone pipeline system. The Board also considers the evidence clear that the Zone 7 cost of service, as determined by the NEB, reflects only the cost of the facilities owned by Foothills. The Board notes that the NEB has not approved any costs for the use of NGTL facilities by Foothills in order to provide service to its shippers.

The Board notes that under its NEB approved tariff, Foothills allocates a share of the Zone 7 cost of service to each of its shippers, based on the shipper’s contract demand. As a result, Foothills recovered 100% of its Zone 7 cost of service from Zone 7 shippers. The Board notes that Foothills’ cost of service did not change as a result of the increase in its capacity. Therefore, the Board is persuaded that Foothills did not receive any financial benefit as a result of the Contract. Accordingly, the Board considers that NGTL has presented an arguable case that the Board, in

\(^8\)Decision E95079, p.34

4 December 1997
Decision E95079, may have erroneously concluded that Foothills acquired valuable capacity by using, without compensation, NGTL facilities required to fulfil the Contract.

The Board is persuaded that any error on this ground could materially affect the Board’s finding that the Contract was not prudent; therefore, the Board will grant a review of Decision E95079 on this ground.

NGTL’s Ground II(b)

NGTL and Foothills submit that the Board erred in its interpretation of the Operating Agreement.

Decision E95079 states:

... under bullet 5.2(c) (of the Operating Agreement) Foothills would also appear to be required to pay for some portion of the 1993 NGT Expansion facilities.20

The Board considers that the wording of clause 5.2 (c) might support the interpretation of the Operating Agreement made by the Board in Decision E95079. However, the Board also notes the positions of NGTL and Foothills that the recitals and definitions of the Operating Agreement specifying the services to be rendered by NGTL do not extend to the provision of transportation service, pressure service or pressure gradients.

The Board notes the concern of SEPAC/CAPP that non-arm’s-length relationships might influence cost sharing arrangements between NGTL and Foothills. The Board considers that correct interpretation of the Operating Agreement is necessary prior to addressing this concern.

In Decision E95079, the Board identified Foothills’ obligation to pay NGTL for the use of its facilities as a “significant reason” for its conclusion that NGTL was obligated to pursue more prudent contractual arrangements. Any error in the interpretation of the Operating Agreement might be material to this conclusion.

The Board considers that NGTL and Foothills have presented an arguable case that in Decision E95079, the Board may have erroneously interpreted the terms of the Operating Agreement to require Foothills and NGTL to share the cost of the 1993 system expansion. The Board notes that the interpretation of the Operating Agreement was not canvassed in the original proceeding. Evidence on this issue would be of assistance to the Board in assessing the merits of parties’

20Decision E95079, p.32 (brackets added)

4 December 1997
Decision U97140

interpretation of the Operating Agreement. Therefore, the Board will grant a review on this ground.

NGTL’s Grounds II(c) and (d)/Foothills’ Error 3

These grounds deal with the following statements of Decision E95079:

... the Board is not convinced by the evidence NGT has provided in this proceeding that NGT was under contractual obligation or any other obligation to deliver Pan-Alberta’s gas or the gas of its other shippers to Foothills at any required minimum pressure, prior to its execution of the Contract.

The Board notes that, while NGT would not appear to be under any obligation to deliver gas to Foothills at any minimum pressure, NGT does appear from the following provisions to have the right to delivery of gas from its customers at a minimum pressure.

The Board considers that NGT could have required Pan-Alberta to increase its delivery pressure up towards the 845 psi at any of the three receipt points into which Foothills delivers Pan-Alberta’s gas into the NGT system. Such a move would have forced Foothills to add compression equipment at the expense of its only customer, Pan-Alberta. 21

These statements were based on interpretations of Articles 7.1 and 7.3 of NGTL’s General Terms and Conditions, which apply to Pan-Alberta’s contract with NGTL, and Article 4.4 of Pan-Alberta’s contract with Foothills. The Board treated the point of interconnection between NGTL and Foothills as receipt and delivery points and it considered that contractual obligations exist in respect of the pressure of gas deliveries from the facilities of one pipeline to another.

In the Board’s view, NGTL has presented an arguable case that the Board in Decision E95079 erred in treating the points of interconnection between NGTL and Foothills facilities as receipt and delivery points under Pan-Alberta’s service agreement with Foothills and in finding that:

(i) Foothills had no entitlement to the increased capacity on its system resulting from increased pressure which was a consequence of NGTL’s 1993 expansion; and

21 Decision E95079, pp.30-31

4 December 1997
(ii) NGTL would be able to cause Pan-Alberta to increase the pressure at which it delivers gas from Foothills to NGTL for the purpose of inducing Foothills to share in cost of NGTL's 1993 expansion in some manner.

In particular, it is not clear how it follows from the Board's not being convinced that NGTL was under a contractual obligation to deliver Pan-Alberta's gas or the gas of its other shippers to Foothills at any required minimum pressure that Foothills was not entitled to the increased capacity. It is also not clear that it is open to NGTL to exercise its discretion to require a shipper to increase the pressure at which it tenders gas to NGTL, up to a maximum for purposes other than those flowing from the term and conditions of its service contracts. Given that these findings are central to the Board's disposition of the complaint, the Board will grant a review on these grounds.

**Foothills' Error 4**

Foothills states there is an error of law and fact in the Board's finding that the contractual relationship between Foothills and Alberta Natural Gas Company is an applicable standard for Foothills and NGTL on Zone 7 and an example of prudent contractual arrangements between informed arm's-length parties.

This view appears to be premised on the following statement in Decision E95079:

> ... an example of such advance contracting for capacity increases is the agreement to share capacity costs and benefits on a reciprocal basis as between Foothills (South B.C.) and Alberta Natural Gas Company Limited for their Zone 8 integrated system. 22

The Board considers this statement was intended to illustrate the Board's general point with respect to advance contracting arrangements. It was not a conclusion of Decision E95079. The Board does not consider the statement to be material to the Decision and will not grant a review on this ground.

**NGTL Ground III/Foothills' Error 5**

Decision E95079 stated:

\[\text{22Decision E95079, p.36}\]

4 December 1997
The Board considers that it would be unjust and unreasonable for NGTL’s shippers to use a portion of the capacity owned by Foothills without paying for the capacity used.23

The Board considers that this statement set out a regulatory principle. The statement does not represent a finding in Decision E95079.

The Board agrees with the position of SEPAC/CAPP that nothing in the Decision confirms that the Board found Foothills owned the incremental capacity. In the absence of such a finding, it is unnecessary to consider whether the circumstances identified by NGTL and Foothills meet the Board’s fourth review criterion. Accordingly, the Board will not grant a review on this ground.

Dated in Edmonton, Alberta 4 December 1997.

C. Bélanger
Chair

P. J. Mink, P.Eng.
Member

N. W. MacDonald, P.Eng.
Member

---

23 Decision E95079, pp.33-34 (emphasis added)