1  
 Exhibit 10-CF  
  
  
 MEMORANDUM OF UNDERSTANDING  
  
  
 This Memorandum of Understanding ("MOU.") is made and entered into as  
of this 1st day of December, 1997 by and between Columbia Gas Transmission  
Corporation ("Columbia"), Westcoast Energy (U.S.), Inc. ("Westcoast"), MCN  
Investment Corporation ("MCN"), and TransCanada PipeLines Limited  
("TransCanada"), sometimes collectively referred to herein as the "Parties" and  
each individually as a "Party").  
  
  
 RECITALS:  
  
  
 A. Columbia currently owns and operates as part of its interstate  
natural gas transmission system the following facilities: (1) Line A-5,  
consisting of 8" to 24" diameter pipe located in the State of New York; (2) the  
portion of Line 1278 and Line K from Milford, Pennsylvania to its  
interconnection with Line A-5; and (3) other related lines, appurtenant  
facilities, land and land rights (collectively referred to herein as the "A-5  
System").  
  
 B. The Parties desire to form a new entity (the "Enterprise") which  
would acquire a portion of the A-5 System and add new facilities to operate as a  
new interstate natural gas transmission system. The resulting system is planned  
to extend from a new Lake Erie export point interconnecting with TransCanada  
PipeLines Limited to a terminus in Westchester County, New York as described on  
Exhibit A attached hereto (the "Project").  
  
 C. The Parties are desirous of entering into this MOU in order to (i)  
set out their respective participation interests in the Project, (ii) ascertain  
the potential demand for the Project, including assessment of supply, end-use  
demand, pricing, preliminary routing and potential regulatory and environmental  
issues for the Project, (iii) provide for a method of funding the activities of  
the Parties and (iv) provide for the management of the Project, all prior to or  
concurrently with the negotiation and execution of definitive agreements  
concerning the ownership, structure and operation of the Enterprise.  
  
 NOW, THEREFORE, in consideration of the mutual benefits to be derived,  
the representations, warranties, conditions and promises contained herein, and  
other good and valuable consideration, the receipt and sufficiency of which are  
hereby acknowledged, the Parties hereby agree as follows:  
  
  
 1  
 2  
 ARTICLE 1  
 PROJECT DEVELOPMENT, MANAGEMENT AND OWNERSHIP  
  
 1.1 Project. The Project will consist of the acquisition of a portion  
of the A-5 System and the development of new facilities into an approximately  
400 mile long 24 and 36 inch diameter high pressure natural gas pipeline with a  
preliminary estimated capacity to exceed 575 MMcf per day.  
  
 1.2 Ownership. The ownership of the Enterprise and the participation  
interests in the Project shall be as follows:  
  
 Columbia 47.5%  
 Westcoast 21%  
 MCN 10.5%  
 TransCanada 21%  
  
The admittance of a new party to the Enterprise and the Project shall be  
permitted, subject to Section 6.03, only by the unanimous vote of the Management  
Committee.  
  
 1.3 Equity Contribution. Each Party's equity contribution to the  
Enterprise shall equal its percentage ownership interest in the Enterprise;  
provided, however, Columbia's contribution will consist, in part, of a portion  
of the A-5 System. The value of Columbia's A-5 System contribution will be the  
net book value of the A-5 System (partial facilities, easements and  
rights-of-way) assigned to the Enterprise which Columbia estimates to be  
approximately $18,400,000 (U.S.) at May, 1999. This contribution shall be  
reduced by the cost of any environmental remediation to the contributed  
facilities, which Columbia estimates to be approximately $1,000,000 (U.S.).  
Furthermore, this contribution will be made to the Enterprise pursuant to an  
agreement (the "Contribution Agreement") that addresses, among other things,  
final valuation of the contribution, the appropriate representations and  
warranties as to title and condition of the assets, and agreement on  
pre-existing liabilities.  
  
 1.4 Development of Project. Columbia will construct, operate and  
maintain the Project for the Enterprise under competitive rates and in  
accordance with a development agreement (the "Development Agreement") and an  
operating, maintenance and management agreement (the "Operating Agreement") to  
be negotiated between Columbia and the Enterprise. It is anticipated that  
Columbia, pursuant to the Development Agreement and Operating Agreement, will be  
reimbursed for certain indirect expenditures incurred in connection with the  
development of the Project and operation of the Enterprise.  
  
 1.5 Definitive Agreements. Following completion of the feasibility  
assessment referred to in Section 2.01 and a finding by the Management Committee  
that the Project is feasible, the Parties agree to utilize commercially prudent  
efforts to negotiate any and all definitive agreements, including but not  
limited to the Development Agreement, the Operating Agreement, the Contribution  
Agreement, and all other agreements that are necessary to form the Enterprise  
and to develop, operate and manage the Project (collectively, the "Definitive  
Agreements").  
  
  
 2  
 3  
 ARTICLE 2  
 PROJECT IMPLEMENTATION, FEASIBILITY AND MANAGEMENT  
  
 2.1 Feasibility of Project. During the term of this MOU, the Parties,  
including any additional parties which may be admitted to the Enterprise, agree  
to work together to assess the overall feasibility of the Project. Such  
feasibility shall include, but not be limited to, various studies, engineering  
and analysis, rate design, marketing activities and Open Season participation.  
Subsequent to a finding by the Management Committee that the Project is  
feasible, the Parties intend to develop, finance, construct and operate the  
Project. Attached hereto as Exhibit B is the schedule setting forth the proposed  
time line for accomplishing certain objectives for the Project.  
  
 2.2 Management Committee. During the term of the MOU, the Project shall  
be managed by a Management Committee (the "Management Committee") which shall be  
comprised of one (1) representative from each Party. Each Party shall appoint  
and designate in writing their own representative to serve on the Management  
Committee. The initial representatives to serve on the Management Committee upon  
the execution of this MOU shall be:  
  
 (a) Columbia Representative: Xxxxx Xxxxxxxx  
 (b) Westcoast Representative: Xxxx Xxxxxx  
 (c) MCN Representative: Xxxx Xxxxxxxx  
 (d) TransCanada Representative: Xxxxx Xxxxxx  
  
The representatives shall serve on the Management Committee until such time as  
he or she resigns, is replaced by another representative, or the appointing  
party ceases to be a Party. Each Party shall have the right from time to time  
and at any time to designate in writing to the other Parties an alternate or  
substitute representative to serve on the Management Committee. It is  
anticipated by the Parties that the Definitive Agreements will provide for the  
same management structure as set forth in this MOU with such modifications as  
may be agreed by the Parties.  
  
 2.3 Duties of Management Committee. The Management Committee shall  
conduct, direct and exercise full control over all activities of the Enterprise  
and the Project. Except as otherwise expressly provided herein, all management  
powers over the business and affairs of the Project and Enterprise shall be  
exclusively vested in the Management Committee. The Management Committee shall  
have full power and authority to do all things necessary or desirable by it to  
further the development of the Project and formation of the Enterprise.  
  
 2.4 Chairman of the Management Committee. The Parties hereby agree that  
Columbia shall have the right to appoint the initial Chairman of the Management  
Committee for a term of (2) years after the in service date. The Chairman shall  
disburse all payments, maintain accounts and financial records and carry on all  
other financial matters in furtherance of the Enterprise. The Chairman shall  
have the authority to make all approved expenditures on behalf of the Enterprise  
and to make expenditures which vary from the budgeted amounts so long as such  
budget modifications do not cause the cumulative budget amount to exceed lesser  
of (a) ten   
  
  
 3  
 4  
percent (10%) of the cumulative budget or (b) $5,000 (U.S.) without approval  
from the Management Committee. In addition, the Chairman shall be responsible  
for notifying the representatives of each meeting of the Management Committee,  
presiding over each such meeting and ensuring that accurate minutes of each  
meeting are kept and distributed to each representative.  
  
 2.5 Meetings of the Management Committee. The business of the  
Management Committee shall be conducted at regular meetings, which shall be  
held, at such date, time and place as shall from time to time be determined by  
the Management Committee upon two (2) days advance written notice. In no event  
shall meetings occur less than once a month.  
  
 2.6 Voting. Except as otherwise provided herein, the day!to!day  
business activities of the Enterprise shall be approved by the affirmative vote  
of at least two members of the Management Committee representing at least fifty  
and one-tenth percent (50.1%) of the proposed ownership interests in the  
Enterprise as set forth in Section 1.02. Voting may be in person, by proxy or in  
any other manner as deemed appropriate by the Management Committee. The  
following decisions shall require the approval of all of the members of the  
Management Committee entitled to vote thereon:  
  
 (a) Approval of the Contribution Agreement  
 (b) Approval of the Development Agreement  
 (c) Approval of the Operating Agreement  
 (d) Approval of the Lease Agreement  
 (e) Subject to Section 2.04, amendment of the 1997 and  
 1998 Budgets  
 (f) Any other material agreement by Columbia on behalf of  
 the Project with Columbia or its affiliates  
 (g) A finding the Project is feasible pursuant to Section  
 2.01  
 (h) All precedent agreements  
  
 2.7 Action Without Meeting. Any action required or permitted to be  
taken by the Management Committee at any meeting may be taken without a meeting  
if a consent in writing setting forth the action so taken is signed by all of  
the representatives of the Management Committee. Such consent shall have the  
same force and effect as if such action was taken at a meeting of the Management  
Committee.  
  
 2.8 Telephone Meetings. The Management Committee may hold, and each  
member thereof may participate in, a meeting of the Management Committee by  
using conference telephone or similar communications equipment by means of which  
all members participating in the meeting can hear each other, and participation  
in such meeting shall constitute presence in person at such meeting.  
  
  
 4  
 5  
 ARTICLE 3  
 BUDGET AND CASH CONTRIBUTIONS  
  
 3.1 Budget. The initial budget (the "Budget"), delineated by line item  
of expenditure for each month for 1997 is attached hereto as Schedule 3.01. Upon  
request, the Parties shall be entitled to receive a full accounting of all  
expenditures to date and shall be entitled to audit such costs.  
  
 3.2 Cash Calls. At the direction of the Management Committee, the  
Chairman shall make written calls for cash contributions ("Cash Calls") from the  
Parties to fund the Budget. Such Cash Calls shall be made no more frequently  
than once a month. Each Party's contribution shall be proportionate to the  
equity participation in the Project described in Section 1.02 of this MOU. Each  
Party shall bear its proportionate share of all historical costs and expenses  
incurred by Columbia through and including the date of execution of this  
Agreement and shall pay such proportionate shares of costs and expenses to  
Columbia on or before ten (10) days of execution of this Agreement; provided  
that any such payment shall be subject to adjustment if the Management Committee  
so determines as a result of any audit performed pursuant to Section 3.01. Each  
Party shall tender its share of the Cash Call within ten (10) days of receipt of  
the notice of such Cash Call from the Chairman. Any payments not made timely  
shall accrue interest charges at the prime rate of interest charged by Citibank,  
N.A. for the applicable period plus two (2) percentage points. If a Party  
remains in arrears on the payment of any Cash Call for more than forty-five (45)  
days, then the representatives of those Parties of the Management Committee  
representing at least a majority of the proposed ownership interest in the  
Project who are not in arrears with respect to any Cash Calls may by written  
notice terminate that Party's rights to participate in the Enterprise, with no  
recourse against the remaining Parties and with no right to refund of amounts  
already paid in response to Cash Calls. In addition, the defaulting Party shall  
remain liable for all unpaid Cash Calls for which that Party remains in arrears.  
  
 3.3 Recoverable Costs. The recovery of expenses associated with  
employees of individual Parties will not be permitted unless provided for in the  
Budget or expressly approved by the Management Committee. Attached hereto as  
Schedule 3.03 is a list of all Columbia employees that are permitted to recover  
labor and reasonable overhead expenses and all reasonable travel and travel  
related expenses that are for the benefit of the Project. These expenses are  
reflected in Schedule 3.01. Employee expenses of non Columbia employees which  
are permitted to be recovered shall be recoverable at the rate of $400.00 per  
day plus all reasonable travel and travel related expenses of such employees  
that are for the benefit of the Project and approved by the Management  
Committee, provided they are submitted within 45 days of the end of the month in  
which the expenses were incurred. All costs and expenses incurred by the Parties  
prior to the execution of this MOU shall be deemed to be contributions to the  
Enterprise only if such costs and expenses are approved by the Management  
Committee and submitted within 45 days of execution of the MOU.  
  
  
 5  
 6  
 ARTICLE 4  
 NON-COMPETITION AND CONFIDENTIALITY  
  
 4.1 Non-Compete. The Parties agree to work exclusively with one  
another, to evaluate the Project and to complete the Project if the results of  
the due diligence and studies indicate positive feasibility. The Parties agree  
not to participate in the development of or invest in, directly or indirectly as  
an equity participant, any other greenfield project or venture into the U.S.  
Northeast which, if developed, would offer natural gas transportation services  
in competition with the Project until the later of (a) the filing of the  
application for approval of a FERC certificate of public convenience and  
necessity authorizing the Project or (b) the expiration of one (1) year from the  
date of this MOU, unless a Party discloses such interest in a potentially  
competing project and receives written consent to participate from the  
Management Committee. The Parties shall be free to pursue any complimentary or  
non-competing ventures without the participation of any other Party. The Parties  
hereby agree that Columbia's service on its existing transmission system and  
Columbia's market expansion project authorized pursuant to FERC Docket No.  
CP96-213 will not be deemed as a violation of its covenant not to compete. The  
Parties further acknowledge that Westcoast is involved in the Maritimes and  
Northeast Pipeline Project, MCN is involved in the Portland Natural Gas  
Transmission Project, and TransCanada is involved in the TransMaritime Gas  
Transmission Project, Iroquois Gas Transmission and the Portland Natural Gas  
Transmission Project, as well as the TransCanada PipeLine, Limited Canadian  
Mainline, and the Parties agree that participation or ownership in any of the  
aforementioned projects or pipelines, or any contemplated or future expansions  
thereof, will not be a violation of the covenant not to compete.  
  
 4.2 Confidentiality. The Parties agree that the nature, existence and  
terms of this MOU shall be subject to the terms and conditions of the  
Confidentiality Agreements (the "Confidentiality Agreements") previously  
executed by the Parties.  
  
 ARTICLE 5  
 TERMINATION  
  
 5.1 Definitive Agreement Supersedes. Upon the execution of the  
Definitive Agreements contemplated in Section 1.05, this MOU shall be wholly  
superseded.  
  
 5.2 Project Not Feasible. Upon unanimous determination by the Parties  
in writing that the Project is not feasible and will not be pursued, this MOU  
shall terminate with no continuing rights or obligations except as provided in  
Section 4.02; provided, however, that the covenant not to compete will be  
released for all Parties. Further, should this MOU be terminated as provided for  
in this Section 5.02, the Parties shall not be entitled to reimbursement of any  
expenses incurred in furtherance of the Project incurred through the date of  
termination; provided, however, the Parties shall remain liable for all expenses  
incurred and previously authorized by the Management Committee.  
  
 5.3 Withdrawal by Individual Parties. At any time prior to the  
execution of the Definitive Agreements, any Party may withdraw from its  
participation in the Project and this   
  
  
 6  
 7  
MOU by delivering to the Management Committee written notice of its intention to  
withdraw. No Party withdrawing pursuant to this Section 5.03 shall be entitled  
to reimbursement of any expenses in furtherance of the Project incurred through  
the date of withdrawal and such Party shall remain liable for all Cash Calls  
made prior to the date of such withdrawal; provided, however, if the remaining  
Parties continue the Project, then the withdrawing Party shall be entitled to an  
amount equal to its cash contributions to the Enterprise upon the commencement  
of commercial service of the Project or upon the introduction of a substitute  
Party to the Enterprise, so long as either occurs within five years from the  
date of withdrawal. Unless the remaining Parties agree otherwise, the remaining  
Parties will receive a pro rata share of the withdrawing Party's rights in and  
to the Enterprise and the Project.  
  
 5.4 No Agreement. If no Definitive Agreements have been signed by the  
Parties by February 1, 1998 and the Parties have not elected in writing to  
continue the terms and conditions of this MOU, then the MOU shall terminate  
automatically; provided, however, each Party shall continue to be obligated to  
pay for its share of costs and expenses approved by the Management Committee and  
incurred prior to the termination of this MOU.  
  
 ARTICLE 6  
 MISCELLANEOUS  
  
 6.1 Preliminary Agreement. The Parties acknowledge and agree that this  
MOU, although binding, is a preliminary agreement between the Parties concerning  
the Enterprise and the Project and does not contain comprehensive details  
concerning the management, organization, funding, development, construction,  
operation, and other matters which will be essential to the Enterprise and the  
Project and which will be set forth in the Definitive Agreements. The purpose of  
this MOU is to establish the relationship between, and the obligations of, the  
Parties prior to execution and delivery of the Definitive Agreements as well as  
to provide an outline of the basic terms and conditions of the Definitive  
Agreements. The obligation of the Parties to proceed with the Project and the  
Enterprise beyond the obligations expressly set forth in this MOU is subject in  
all respects to the execution and delivery of the Definitive Agreements.  
  
 6.2 Relationship of Parties. This MOU does not create a partnership,  
joint venture or relationship of trust or agency between the Parties.  
  
 6.3 Assignment. Except as otherwise provided herein, this MOU shall not  
be assigned without the prior written consent of the Parties, which consent  
shall not be unreasonably withheld. Notwithstanding the foregoing, this MOU may  
be assigned without the consent of the other Parties to (a) a wholly owned  
affiliate with financial support of the assignor, or an affiliate of equivalent  
or greater financial capability or (b) following the interest being first  
offered through a right of first refusal to the remaining Parties to this MOU,  
any entity succeeding to all or substantially all of the assets of such Party,  
provided any such assignee expressly agrees in writing to bound by the terms of  
this MOU.  
  
 6.4 Amendment. This MOU may not be altered, changed or amended, except  
by an instrument in writing executed by all parties hereto.  
  
  
 7  
 8  
 6.5 Choice of Law. This Agreement shall be governed and construed in  
accordance with the State of Delaware except to the extent of any laws of the  
United States of America and any rules, regulations, or orders issued or  
promulgated thereunder applicable to this Agreement preempt Delaware Law, in  
which event such Federal Law shall control.  
  
 6.6 Notices. Except as may otherwise be specifically provided for  
elsewhere herein, any notice or communication required or permitted hereunder  
shall be in writing and shall be deemed to have been duly given (i) if sent by  
registered or certified mail (return receipt requested) on the date that is five  
(5) business days following the date when delivery is made to the U.S. or  
Canadian Postal Services (ii) if delivered personally, on the date that delivery  
is made, (iii) if sent by facsimile on a business day during the hours of 8:00  
and 5:00 p.m. ET by a facsimile machine which generates an electronic  
confirmation of such receipt on the date when sent, and if sent by facsimile  
after 5:00 p.m. ET on a business day, on the next following business day, or  
(iii) if sent by overnight mail or overnight courier, on the business day  
following the day when sent, at the following addresses (or at such other  
addresses as shall be specified by the Parties from time to time):  
  
 Columbia: 00000 Xxxx Xxxxx Xxxxxxx  
 Post Office Box 10146  
 Fairfax, Virginia 22030  
 Att.: Xxxxx Xxxxxxxx  
 Telephone: (000) 000-0000  
 Telecopy: (000) 000-0000  
  
 Westcoast: 00 Xxxx Xxxxx Xxxxx  
 Xxxxxxx, Xxxxxxx  
 Xxxxxx X0X 0X0  
 Xxx.: Xxxx Xxxxxx  
 Telephone: (000) 000-0000  
 Telecopy: (000) 000-0000  
  
 MCN: City Place I  
 000 Xxxxxx Xxxxxx, 00xx Xxxxx  
 Xxxxxxxx, XX 00000  
 Att.: Xxxx Xxxxxxxx  
 Telephone: (000) 000-0000  
 Telecopy: (000) 000-0000  
  
 TransCanada: TransCanada Pipelines Tower  
 000 0xx Xxxxxx, XX  
 Xxxxxxx Xxxxxxx  
 X0X 0X0  
 Xxx.: Xxxxx Xxxxxx  
 Telephone: (000) 000-0000  
 Telecopy: (000) 000-0000  
  
  
 8  
 9  
 6.7 Damages. No Party shall have any liability to the other Parties for  
special, incidental, indirect or consequential damages nor for any matter  
whatsoever associated with the activities covered by this MOU, except as  
specifically set forth herein.  
  
 6.8 Entirety. This MOU and the Confidentiality Agreements constitute  
the entire agreement between the Parties with respect to the subject matter  
hereof, and, except for the Confidentiality Agreements, all prior  
correspondence, memoranda, agreements or understandings (written or oral) with  
respect hereto are merged into and superseded by this MOU.  
  
 6.9 Counterparts. This Agreement may be executed in one or more  
counterparts, each of which shall be deemed an original and all of which shall  
constitute one and the same instrument.  
  
 If fewer than all of the Parties execute this MOU, it shall  
nevertheless be enforceable against the Parties executing this MOU and the  
ownership of the Enterprise, and the participating interests in the Project  
shall be adjusted on a pro-rata basis among the Parties that have executed this  
MOU unless the remaining parties agree otherwise.  
  
  
 9  
 10  
IN WITNESS WHEREOF, executed as of the date first written above.  
  
 Columbia Gas Transmission Corporation  
  
 By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 Printed Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
  
 Westcoast Energy (U.S.), Inc.  
  
 By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 Printed Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
  
 MCN Investment Corporation  
  
 By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 Printed Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
  
 TransCanada PipeLines Limited  
  
 By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 Printed Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
  
  
 By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 Printed Name:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 Title:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
  
  
 10