

Cited as "1 ERA Para. 70,549"

Tennessee Gas Pipeline Company (ERA Docket No. 81-24-NG), May 19, 1982

DOE/ERA Opinion and Order No. 44

Conditional Order Authorizing Tennessee Gas Pipeline Company to Import Natural Gas from Canada and Denying Intervention

I. Background

On April 22, 1981, Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee), filed an application with the Department of Energy's (DOE) Economic Regulatory Administration (ERA), pursuant to Section 3 of the Natural Gas Act, for authorization to import natural gas from Canada. Tennessee plans to purchase and import up to 300,000 Mcf per day of natural gas for resale from TransCanada PipeLines Limited (TransCanada) pursuant to two Precedent Agreements and Gas Purchase Contracts. The first contract provides for the sale of up to 100,000 Mcf per day through Tennessee's existing facilities at the international border near Niagara Falls, New York. The second contract provides for the sale and purchase of up to 200,000 Mcf per day at the Niagara Falls location or other points along the international border.

The term of the contract for 100,000 Mcf per day is for ten years effective on the date deliveries start but in no event later than November 1, 1982. The term of the 200,000 Mcf per day contract is ten years from the date deliveries start. Both contracts have provisions allowing an additional year for the delivery of contract quantities of gas not delivered during the primary contract term.

In addition, Tennessee requests authorization to import, on any day, gas in excess of 300,000 Mcf per day on a best efforts basis, but under no circumstances can the volumes sold exceed the total contract quantities of 365,200,000 Mcf under the contract for 100,000 Mcf per day and 730,600,000 Mcf under the ten-year contract for 200,000 Mcf per day.

Each contract provides that the gas will be sold at the international border price established by the National Energy Board of Canada (NEB) for natural gas exports, currently U.S. \$4.94 per MMBtu. Both contracts require Tennessee to take and pay for, or nevertheless pay for, an annual quantity of gas equal to seventy-five percent (75%) of the total daily contract quantity (300,000 Mcf) times the number of days in the contract year, less any volumes requested by Tennessee, but not delivered by TransCanada.

Tennessee will own and operate all facilities needed to provide transportation of the imported natural gas. Tennessee has also filed a related application with the Federal Energy Regulatory Commission (FERC) requesting authority to construct and operate additional facilities needed for receipt and marketing of certain of the volumes of gas proposed to be imported.

Tennessee cites several bases for requesting the authority to import natural gas from Canada. Among the specific reasons listed by Tennessee are the firm's past inability to meet its customer requirements, the expectation that its supply deficiencies will continue throughout the proposed import term, and the need for additional supplies to enable Tennessee to meet winter peak day and seasonal demands, thereby minimizing its customers' reliance on imported fuel oil.

On August 19, 1981, ERA requested additional information regarding specific aspects of its application from Tennessee. Tennessee responded on September 30, 1981. On February 19, 1982, we issued an order granting interventions and stating that we saw no need to request further written comments or hold a prehearing conference. However, we provided all parties additional opportunity, through March 8, 1982, to request any further proceedings. No such request was made. However, two parties filed comments, which are discussed in the next section of this order.

II. Intervention and Comment

Notice of receipt of Tennessee's application was published in the Federal Register on May 28, 1981 (46 FR 28696). In that notice ERA solicited comments, protests, petitions to intervene and notices of intervention. In response to that notice and prior to our February 19, 1982 Order (discussed below), twenty-two parties either petitioned to intervene or entered notice of intervention.^{1/} None opposed the application and none requested any further proceedings.

Five intervenors stated their support of the application.^{2/} Midwestern Gas Transmission Company (Midwestern), which neither supported nor opposed the project, requested that ERA indicate to Canada a preference that, should Canadian exportable supplies prove inadequate, ongoing imports would have priority over new projects.

ERA's Order of February 19, 1982, granted intervention to all of the twenty-two interested persons who had filed up to that time and provided additional opportunity to intervenors to request further proceedings. In response to the February 19, 1982 Order, Transcontinental Gas Pipe Line

Company (Transco) filed timely comments, which were endorsed in a timely separate submission by Algonquin Gas Transmission Company (Algonquin).

In its comments Transco expressed concern that case-by-case review of individual import projects could be prejudicial to some applicants if sequential approvals might be viewed as establishing a preference for one project over another. Should the Canadian exportable surplus prove inadequate to support all projects, Transco is concerned that such a supposed preference could operate to the benefit of the applicant receiving the earlier approval.

On March 16, 1982, the Canadian National Energy Board (NEB) began the three-part Gas Export Omnibus Hearings. Phase I will, among other things, review the procedures the NEB uses to determine the amount of surplus gas available for export. Phase II will examine aspects of the individual applications for export licenses and Phase III, scheduled to commence in mid-September, will consider the surplus available for export and determine which applicants the NEB should recommend to receive export licenses. A final decision is expected at the end of 1982.

The ERA believes it would be inappropriate to engage in speculation with regard to the NEB's anticipated determination of the level of surplus gas available for export, or whether such levels will be adequate to satisfy all export license requests. Moreover, we cannot predict what actions the NEB might take with respect to individual applications for export licenses.

In response to the concerns of Midwestern, Transco and Algonquin, ERA wishes to emphasize that nothing in this decision should be viewed as implying that ERA has a preference for this import project over another or is issuing decisions in any preferential sequence. This order is issued at this time because we have determined that ERA Docket No. 81-24-NG is ripe for decision and because this project is not inconsistent with the public interest. We intend to issue decisions in the other pending cases as they become ready for decision. ERA does, of course, have the authority to reopen this or any other proceeding should future action by the NEB make it appropriate to do so.

In addition to the 22 petitions to intervene discussed above, three other petitions recently were received. On February 28, 1982, Michigan Wisconsin Pipe Line Company (Michigan Wisconsin) petitioned to intervene out-of-time, and on March 24, 1982, both the New England Fuel Institute (NEFI) and the Empire State Petroleum Association (ESPA) petitioned to intervene out-of-time. Tennessee filed answers opposing each of these petitions to intervene out-of-time. Boundary Gas, Inc. (Boundary) filed an answer opposing NEFI's and ESPA's petitions.

Title 18 CFR 1.8 sets forth the procedures governing interventions in ERA proceedings. Specifically, section 1.8(d) states in relevant part:

"Petitions to intervene and notices of intervention may be filed at any time following the filing of . . . an application . . . but in no event later than the date fixed for the filing of petitions to intervene in any order or notice . . . unless, for good cause shown, the [ERA] authorizes a late filing" (emphasis added).

In prior cases,^{3/} the ERA has authorized intervention by persons whose petitions were filed out of time, based on one or more of the following considerations: (1) whether granting intervention would delay the proceeding; (2) whether granting intervention would prejudice the rights of any of the parties already in the case; (3) whether any objections to the late petitions had been received; (4) whether any significant orders had been issued or any oral evidence has been received in the proceeding; (5) whether granting intervention would otherwise adversely affect issuance of a timely decision; and (6) whether the late petitioner has stated a credible and reasonable basis for failing to file on time. Based on its consideration of these factors, as well as any other relevant considerations raised by ERA on its own motion or by any parties objecting to a late petition, ERA must determine whether the fundamental "good cause shown" standard in section 1.8 has been met.

Michigan Wisconsin states that it has a substantial interest in the proceeding because it imports Canadian gas and Tennessee's application could have an adverse impact on Michigan Wisconsin's efforts to acquire additional gas supplies from Canada. Michigan Wisconsin states that it delayed filing for intervention.

". . . until it became clear, by the number of import applications filed to import Canadian gas, the single export proceeding relative thereto which the NEB has created, and the timing of likely United States consideration of all such import applications, that such various applications are likely to be interdependent, in part, at least."

Tennessee opposes Michigan Wisconsin's petition to intervene, alleging that, although the petition was filed almost eight months after the June 29, 1981, deadline, Michigan Wisconsin failed to demonstrate good cause for granting its petition out-of-time. In support of this assertion, Tennessee notes that other applications to import gas from Canada were already pending when Tennessee filed its application on April 22, 1981, and that the NEB

omnibus proceeding was not unusual because the NEB had previously consolidated export applications under its consideration.

NEFI's and ESPA's statements indicate that in the aggregate, they represent 1800 fuel oil dealers who are in direct competition with various Tennessee customers. If permitted to intervene, NEFI and ESPA state that they would present information demonstrating the lack of any national or regional need for the additional imported supplies. NEFI and ESPA are parties in ERA Docket No. 81-04-NG (the Boundary case), and in the Boundary proceedings before FERC, FERC Docket Nos. CP81-107 and CP81-108.

NEFI and ESPA both state that they initially believed that their interventions in the Boundary case enabled them to represent their interests in all aspects of the Tennessee application, and because of this confusion they did not intervene earlier in the instant proceeding. In addition, NEFI and ESPA state that only recently have adequate financial resources become available to permit participation in all aspects of the Boundary and Tennessee proceedings. Finally, NEFI and ESPA state that their intervention will not delay ERA's consideration of Tennessee's application because no proceedings have been held and no substantive orders have been issued.

In its answer opposing NEFI's and ESPA's respective petitions to intervene out-of-time, Tennessee states that NEFI's and ESPA's alleged confusion concerning the coverage of the different applications "strains credulity." Tennessee notes that NEFI and ESPA have been very active intervenors in the Boundary case and asserts that NEFI's and ESPA's ". . . pleadings in that case exhibit a high degree of familiarity with the subject of that case and belie any suggestion that NEFI and ESPA did not understand that Tennessee's own separate application to import was not encompassed in the Boundary Gas proceeding." Tennessee also challenges NEFI's and ESPA's contention concerning the alleged absence of proceedings and substantive orders, and cites its response to ERA's August 19, 1981, request for additional information and ERA's February 19, 1982, order offering an opportunity to request further proceedings if any party disagreed with ERA's preliminary determination that the record was sufficiently complete to allow ERA to reach a decision regarding Tennessee's application. Tennessee concludes that NEFI's and ESPA's late interventions could delay prompt consideration of its application.

In its answer opposing NEFI's and ESPA's late petitions, Boundary states that the alleged confusion concerning the coverage of the different applications cannot be attributed to any lack of notice of Tennessee's application and says that NEFI and ESPA offer no valid explanation of why

such large organizations, with their sizeable revenue bases, could not have afforded to file timely petitions to intervene.

After careful review of the above arguments, ERA has determined that the Michigan Wisconsin, NEFI and ESPA petitions should be denied. All persons had ample time to intervene when ERA provided the initial opportunity to intervene in its Federal Register Notice of May 28, 1981, and ERA believes none of these late petitioners has shown good cause for its failure to request intervention in a timely manner. Additionally, ERA believes that granting intervention to NEFI and ESPA for the purpose of introducing new material, well after ERA indicated its opinion that the record was sufficient, would delay the proceeding to the probable prejudice of all the other parties involved.

III. Environmental Determination

The Secretary of Energy has delegated to the Administrator of ERA the responsibility to authorize imports pursuant to Section 3 of the Natural Gas Act. Certain other areas of responsibility, however, have been delegated to the Federal Energy Regulatory Commission (FERC). Specifically, FERC has jurisdiction over "all functions under Section 3 of the Natural Gas Act to approve or disapprove the construction and operation of particular facilities and the site at which they would be located" Thus, the jurisdiction over the siting and construction of the facilities required by this import is clearly FERC's.

The National Environmental Policy Act of 1969 (NEPA) requires ERA to give appropriate consideration to the environmental effects of its proposed actions: in this case, authorization to import natural gas. The FERC has the statutory responsibility to perform an environmental review before making its own decision on Tennessee's FERC Section 3 application. It is appropriate, therefore, that FERC should be lead agency in terms of reviewing the environmental impacts of this import.

Since we cannot now determine whether this import is a major federal action requiring the preparation of an environmental impact statement under NEPA, we are precluded from issuing a final order approving the project. We are, therefore, issuing a conditional order based on our review of the record before us. Once the FERC has completed whatever environmental review is necessary, we will complete our own environmental review based on the FERC's analysis, reconsider this opinion and issue a final order. Our conditional decision clears the way for FERC to perform the environmental review and indicates to the parties ERA's determination on the non-environmental issues in this case. Since this is not a final order, approval neither jeopardizes

the environment nor limits our alternatives in making a final decision on the environmental determination.

IV. Decision

Since ERA was delegated authority over Natural Gas Act Section 3 applications in 1977, we have issued numerous opinions in natural gas, liquefied natural gas and synthetic natural gas import and export cases. These opinions were based on fundamental considerations such as security of supply, national and regional need for the gas, price, and other factors set forth in DOE Delegation Order 0204-54.4/ The instant proceeding involves one of several applications to import significant volumes of natural gas into new markets from a traditionally secure source of supply. ERA's responsibilities in determining whether this application is "not inconsistent with the public interest" involve important considerations of international relations, current conditions in international fuel markets, and national security as well as the other fundamental considerations mentioned above.

Although in our August 19, 1981, request for further information, we identified a number of specific policy-related issues in this proceeding,^{5/} there is no evidence in the public record in this case that this import should be denied because it might be inconsistent with the public interest.

In accordance with our responsibilities under Section 3 of the Natural Gas Act, we have carefully evaluated Tennessee's application, taking into consideration information in the record of this proceeding as well as relevant public information. ERA has concluded that this application for importation meets statutory and regulatory tests, is not "inconsistent with the public interest" and should be authorized.

A. Need for the Import

Most recent studies ^{6/} indicate a long term decline of production from conventional natural gas reserves which is the traditional source of U.S. gas production. Consequently, there will be a continuing national need for additional natural gas beyond conventional resources through the next decade. Tennessee in its application referred to one such report citing the decline in domestic production and the need for imports from Canada.^{7/} No intervenors contested Tennessee's assessment of the national need for additional natural gas beyond traditional domestic sources. This need for gas beyond the conventional sources of gas can be fulfilled by unconventional sources and by the importation of natural gas. As long as Canadian imports are price competitive and maintain their long term historical reliability, they will

fulfill some of this need. Therefore, it is not inconsistent with the public interest to import price competitive natural gas to meet this anticipated national need.

Tennessee's need for the imported gas as expressed in its application and response to ERA's data request is supported by Tennessee's uncontroverted forecast of a significant decline in gas from conventional sources over the life of the agreements and the decline of projected reserve acquisitions. The importation of Canadian gas is one of several Tennessee projects designed as a substitute for declining sources of conventional gas. Tennessee estimates demand for its available natural gas to be equivalent to its Annual Volume Limitation (1317 Bcf per year) for its customers. Under this assumption Tennessee projects shortfalls in supply increasing over the term of the contract.

Assuming a more conservative demand figure, such as a static figure of 1130 Bcf per year which approximates recent uncurtailed sales, there may be a very slight surplus in the initial years of the contract with a significant growing deficit in the middle and later years of the contract. The potential small short-term surplus could be changed with a small variation of the supply or demand side of the equation. Consequently the record provides a sufficient indication of need and justification for the ten year period.

The need for the natural gas is reinforced by the Tennessee history of curtailments cited by Tennessee and recognized by ERA in previous approvals of Tennessee applications to import natural gas.^{8/}

B. Border Price of the Import

Tennessee proposes that the price of the gas to be imported will be the uniform international border price for Canadian gas, presently U.S. \$4.94 per MMBtu. In DOE/ERA Opinion and Order No. 29, the ERA found that the present Canadian border price for natural gas exported to the United States of U.S. \$4.94 per MMBtu is reasonable compared to the cost of alternate fuels in the U.S. market, and not inconsistent with the public interest.^{9/} Consequently, we find that the price for this import is reasonable and should be approved.

C. Additional Conditions

ERA's concerns about increased U.S. reliance on Canadian natural gas and various related issues have been raised previously in consolidated ERA Docket Nos. 80-01-NG, et al., Inter-City Minnesota Pipelines Ltd., et al.^{10/} Because ERA believed that such issues may be more appropriately considered in

bilateral discussions with Canadian officials, it suspended final resolution of the consolidated dockets until after government-to-government talks.¹¹ We therefore specifically reserve the right to take additional action in this docket that will parallel any future proceedings in ERA Docket No. 80-01-NG, and parties are hereby placed on notice that any conditions subsequently adopted may be retroactive to the date of approval of this import if necessary and appropriate in the circumstances.

Order

For the reasons set forth above, the ERA hereby orders that:

A. Pursuant to Section 3 of the Natural Gas Act, Tennessee Gas Pipeline Company (Tennessee) is authorized to import 100,000 Mcf per day of natural gas for a period from the date deliveries commence or from November 1, 1982, whichever occurs first, plus one year for receipt of make-up gas in accordance with the Precedent Agreement and Gas Purchase Contract of November 5, 1980, as amended by the Amendment to Precedent Agreement of March 3, 1981, with TransCanada PipeLines Limited (TransCanada), and 200,000 Mcf per day for a period of ten years from the date deliveries commence plus one year for receipt of make-up gas in accordance with the Precedent Agreement and Gas Purchase Contract of January 9, 1981, with TransCanada. Tennessee is also authorized to import on a daily basis volumes of gas in excess of their respective contract volumes herein approved which TransCanada is authorized to export for sale to Tennessee on a best efforts basis in accordance with the Precedent Agreements and Gas Purchase Contracts cited herein, except that the total natural gas import may not exceed 1,095,800,000 Mcf.

B. Pursuant to Section 3 of the Natural Gas Act, Tennessee is authorized to import the volumes of natural gas from Canada as described in Paragraph A at a unit price not to exceed U.S. \$4.94 per MMBtu.

C. The petitions for leave to intervene out-of-time of Michigan Wisconsin Pipe Line Company, the new England Fuel Institute and the Empire State Petroleum Association are hereby denied.

D. The authorization in Ordering Paragraph A is conditional pending a final ERA order upon completion, and review by DOE, of any FERC environmental analyses on this project.

E. Pursuant to Section 3 of the Natural Gas Act, the authorization granted herein is subject to conditions as may result from further proceedings in this case. Applicants and intervenors in this proceeding shall be bound by

Opinions and Orders issued in further proceedings in this case.

Issued in Washington, D.C. on May 19, 1982.

--Footnotes--

1/ Boundary Gas, Inc.

Transcontinental Gas Pipe Line Corp.

Northwest Alaskan PipeLine Co.

Long Island Lighting Co.

East Tennessee Natural Gas Co.

Alabama-Tennessee Natural Gas Co.

Consolidated Edison Company of New York, Inc.

The Brooklyn Union Gas Company

New York State Energy Office

Natural Gas Pipeline Company of America

Northern Natural Gas Company, Division of InterNorth Inc.

Algonquin Gas Transmission Co.

Boston Gas Co.

United Mid-Continent Pipeline Co.

United Gas Pipe Line Co.

The Peoples Gas Light and Coke Co.

Midwestern Gas Transmission Co.

TransCanada PipeLines Ltd.

Public Service Electric and Gas Corp.

Texas Eastern Transmission Corp.

Public Service Commission of the State of New York

Connecticut Natural Gas Corp.

2/ Long Island Lighting Co.

East Tennessee Natural Gas Co.

Alabama-Tennessee Natural Gas Co.

Boston Gas Co.

TransCanada PipeLines Limited

3/ See, for example DOE/ERA Opinion and Order No. 12, issued December 29, 1979, in ERA Docket No. 79-31-NG, Border Gas, Inc. (1 ERA Para. 70,501, Federal Energy Guidelines); and DOE/ERA Opinion and Order No. 36, issued October 26, 1981, in ERA Docket No. 81-28-NG, Midwestern Gas Transmission Co. (1 ERA Para. 70,536, Federal Energy Guidelines).

4/ 44 F.R. 56,735 (October 2, 1979).

5/ Security of supply, degree of reliance on imported gas, degree of vulnerability to interruption, the impact on domestic natural gas production and distribution, and the long term economic impact of the import.

6/ U.S. Department of Energy, Energy Information Administration, 1981 Annual Report to the Congress, February, 1982, pg. 70.

U.S. Department of Energy, Office of Policy, Planning and Analysis, Energy Projections to the Year 2000, July, 1981, pg. 6.2.

U.S. Department of Energy, Office of Policy, Planning and Analysis, Two Market Analysis of Natural Gas Decontrol, November, 1981, pp. 9, 14, 22.

7/ General Accounting Office, Comptroller General, Oil and Natural Gas From Alaska, Canada, and Mexico--Only Limited Help For U.S., September 11, 1980, pp. 70-72.

8/ DOE/ERA Opinion and Order No. 17, issued July 7, 1980, in ERA Docket No. 79-08-NG, Transcontinental Gas Pipe Line Corporation, Tennessee Gas

Pipeline Company (1 ERA Para. 70,512, Federal Energy Guidelines); and DOE/ERC Opinion and Order No. 32, issued April 24, 1981, in ERA Docket No. 79-15-NG, Natural Gas Pipeline Company of America, Michigan Wisconsin Pipe Line Company, Tennessee Gas Pipeline Company, Texas Eastern Transmission Corporation (1 ERA Para. 70,530, Federal Energy Guidelines).

9/ On January 15, 1981, the Government of Canada announced a border price of U.S. \$4.94 per MMBtu for natural gas exported to the United States effective April 1, 1981. In Opinion and Order No. 29, issued on March 27, 1981, ERA Docket No. 81-08-NG, et al., Pacific Gas Transmission Company, et al., (1 ERA Para. 70,528, Federal Energy Guidelines), the ERA authorized twelve (12) U.S. importers to pay that price for Canadian natural gas. Subsequent ERA Orders have also authorized imports at the \$4.94 price.

10/ See DOE/ERA Opinion and Order Nos. 14, issued February 16, 1980 (1 ERA Para. 70,502 Federal Energy Guidelines), 14A, issued April 1, 1980 (1 ERA Para. 70,507 Federal Energy Guidelines), 14B, issued May 15, 1980 (1 ERA Para. 70,508 Federal Energy Guidelines) and Prehearing Order, issued July 9, 1980 (1 ERA Para. 70,505 Federal Energy Guidelines).

11/ See DOE/ERA Order Suspending Consideration of Import Cases Pending Outcome Inter-Governmental Discussions, issued December 16, 1980, in Docket Nos. 80-01-NG, et al., Inter-City Minnesota Pipelines Ltd., et al.