

Cited as "1 ERA Para. 70,530"

Natural Gas Pipeline Company of America , Michigan Wisconsin Pipe Line Company, Tennessee Gas Pipeline Company, A Division of Tenneco Inc., Texas Eastern Transmission Corporation (ERA Docket No. 79-15-NG), April 24, 1981.

DOE/ERA Opinion and Order No. 32

Order Approving Application to Import Natural Gas from Canada

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I. Background

On June 4, 1979, four interstate pipeline companies ^{1/} (hereinafter, the ProGas Purchasers or Applicants) filed an application with the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) pursuant to Section 3 of the Natural Gas Act, requesting authorization to import natural gas from Canada into the United States. ^{2/} At that time, the Applicants requested ERA authorization to import a total of 2.19 Tcf of natural gas over a period of 20 years beginning November 1, 1980, at a rate of up to 300,000 Mcf per day, as adjusted. The gas is to be purchased from ProGas Ltd. (ProGas) pursuant to individual Gas Sales Agreements dated May 17, 1979. The agreements provide for delivery of the gas at a point on the international boundary near

Emerson, Manitoba, by TransCanada Pipe Lines Ltd. (TransCanada) to Great Lakes Gas Transmission Company (Great Lakes), and for redelivery by Great Lakes to Michigan Wisconsin at an existing delivery point near Farwell, Michigan. Michigan Wisconsin will then deliver the gas to Natural, Tetco, and Tennessee at interconnecting delivery points. 3/

On December 6, 1979, the National Energy Board of Canada (NEB), issued export license GL-56 to ProGas. The license expires October 31, 1987, and authorizes a total quantity of 602 Bcf (17,050,000,000 cubic meters). The license also authorizes reduced daily volumes according to the table below.

Contract Year

(beginning November 1)

Daily Authorized	1980	1981	1982	1983	1984	1985	1986
Volume (MMcf)	300	300	302	300	225	150	75

On September 30, 1980, the applicants filed a "Motion to Expedite and Request for Conditional Authorization." The motion requested issuance of conditional authorizations based upon a "Letter of Understanding," dated September 17, 1980, among the applicants and ProGas. The Letter of Understanding described proposed substantial revisions to the project. On October 30, 1980, ERA issued an order denying the ProGas purchasers' motion. In that order, we found that

"[t]he Letter of Understanding and the representations made in the Motion are inadequate as a basis for a decision at this time."

Furthermore, we concluded that

"[w]hen delivery arrangements are finalized, the ProGas Purchasers may submit an amendment to their original application, with the proper attachments, so that we might proceed on the basis of the information contained therein."

On January 12, 1981, the applicants filed a "Supplement to Import Applications." 4/ The supplement substantiates the changes to the project described in the September 30 motion. Attached to the supplement are copies of various amendments and agreements contemplated by the Letter of Understanding. These amendments alter the take-or-pay provisions, the quantities to be imported during the first two contract years, and the delivery arrangements. Specifically, the application under consideration here, as amended by the

supplement, provides for the following:

1. The total maximum volume of gas to be imported between the date of the first delivery and November 1, 1982, will be 150,000 Mcf per day. Natural and Michigan Wisconsin assign their rights and obligation to purchase their share of the gas during this period to Tennessee and Tetco so that each of the latter would import up to 75,000 Mcf per day through October 31, 1982.

2. Beginning November 1, 1982, the maximum daily volume will increase to 300,000 Mcf per day, of which 225,000 Mcf per day will be imported at Emerson, and divided among Tennessee, Tetco and Michigan Wisconsin, and 75,000 Mcf per day will be imported at a point near Monchy, Saskatchewan, and delivered to Natural through the facilities of Northern Border Pipeline Company (Northern Border) and Northern Natural Gas Company (Northern).^{5/} However, if Northern Border is unable to provide transportation service at that time, Natural will be able to take delivery of gas at the Emerson, Manitoba, import point and have the gas delivered to its facilities by Great Lakes. In this case, the total amount imported would be 225,000 Mcf per day to be divided among Tennessee, Tetco, Michigan Wisconsin, and Natural.

3. The minimum "take-or-pay" levels in the gas purchase contracts between the ProGas Purchasers and ProGas, effective November 1, 1982, are amended to correspond with those ordered by the Federal Energy Regulatory Commission (FERC) in its April 28, 1980, Order in Docket CP78-123 (Northwest Alaskan Pipeline Company et al.).^{6/}

On January 23, 1981, Tennessee and Tetco filed a joint petition^{7/} requesting that temporary authorizations be granted, citing "emergencies" on their pipelines in part due to the prolonged cold spell in Northeastern areas of the United States served by them. We responded on March 10, 1981, with an order concluding that at that time there was "not sufficient evidence of an imminent emergency situation on either pipeline that would justify the extraordinary action of approving the import on a temporary basis before our consideration of the entire ProGas import proposal is completed." However, we left open consideration of the petition pending receipt of notice from Tennessee or Tetco of an impending emergency situation, stating that if no such notice was received prior to March 31, 1981, the petition would be considered denied. This period has passed without further request for action.

II. Comments

In our order issued March 10, 1981, we granted intervention in this proceeding to sixteen interested persons.^{8/} Six intervenors state their support of the project.^{9/} Of these, Wisconsin Fuel and Light Company (a customer of Michigan Wisconsin), Iowa Electric and Power Company (a customer of Natural), and Iowa-Illinois Gas and Electric Company (a customer of Natural) in their petitions to intervene specifically express the hope that ProGas volumes would help eliminate curtailments by their respective pipeline suppliers. Illinois Power Company, not an intervenor, filed a statement in support of the ProGas purchasers' motion for an expedited decision. No party protested and none opposed the application. No party requested a further hearing. However, the Process Gas Consumers Group and the American Iron and Steel Institute (hereinafter, "PGC and AISI") oppose any decision by ERA to apply incremental pricing under Title II of the Natural Gas Policy Act of 1978 (NGPA) ^{10/} to the imported volumes.

III. Jurisdiction

The Department of Energy Organization Act ^{11/} established the authority of the Secretary of Energy (Secretary) to authorize the import or export of natural gas pursuant to Section 3 of the Natural Gas Act (NGA). The Secretary, in DOE Delegation Order 0204-4, delegated this responsibility to the Administrator of the ERA (Administrator) on October 1 1977 (42 FR 50726, November 29, 1977). Therefore, the Administrator has historically had the authority to authorize imports of natural gas from Canada. However, the amended application contemplates transportation of Natural's portion of the gas through the Northern Border pre-build portion of the Alaska Natural Gas Transportation System (ANGTS) and seeks to import those same volumes at Emerson only if they are not carried by Northern Border. In DOE Delegation Order No. 0204-8 (42 FR 61491, December 5, 1977), the FERC was given exclusive authority over all aspects of the ANGTS not otherwise given to the FERC by statute, including authority to approve imports of natural gas from Canada to the extent they are transported through the pre-build portion of ANGTS. Later, the Secretary issued two orders superseding earlier delegations and delineating the areas of authority between ERA and the FERC in deciding applications to import and export natural gas (DOE Delegation Order Nos. 0204-54 and 0204-55, 44 FR 56735, October 2, 1979). Under DOE Delegation Order No. 0204-54, the ERA Administrator has primary authority with regard to non-ANGTS gas imports. Under Delegation Order No. 0204-55, FERC has authority to decide issues relating to facility construction and siting and the point of entry of the import, as well as certain issues which are within the primary authority of the Administrator but which the Administrator may defer to the FERC for decision.

Therefore, this project involves the Section 3 jurisdiction of both agencies. The FERC has exclusive authority (1) to decide all issues relating to Natural's share of the gas if those volumes enter at Monchy and are transported by Northern Border through ANGTS and (2) to approve or disapprove the point of entry of the non-ANGTS volumes (i.e., Tennessee's, Tetco's, and Michigan Wisconsin's volumes entering at Emerson).^{12/} An application to effectuate the Northern Border transportation was filed with FERC.^{13/} All other issues relating to the import through Emerson, including Northern's volumes if they are not transported by Northern Border, are, in the first instance, within the jurisdiction of the ERA which is, in this Opinion and Order, exercising the full extent of that jurisdiction.

IV. Decision

Upon review of the application as amended and all responses filed thereto, we have determined that the importation of natural gas at Emerson is not inconsistent with the public interest and should be authorized.^{14/} This Opinion and Order authorizes natural gas imports by Tennessee, Tetco, Michigan Wisconsin, and Natural. However, Natural's import at Monchy is not within ERA jurisdiction and is not addressed here. We are granting authorization for Natural to import at places other than Monchy, such as Emerson, to provide for the possibility that Northern Border may not be able to provide transportation by the date specified in the amended agreements.

A. Price

According to the application, the natural gas is to be purchased from ProGas at the rate prescribed by the Canadian Government from time to time, as permitted by the ERA. The current border price is U.S. \$4.94 per MMBtu. On March 27, 1981, we issued DOE/ERA Opinion and Order No. 29,^{15/} in which we determined that the current border price is reasonable and not inconsistent with the public interest. This determination was made by comparing the border price with a weighted national average of residual and distillate fuel oil prices approximating an average alternate fuel price. Using this methodology, we found that the \$4.94 price is within the competitive range of alternate fuels in the United States and is therefore reasonable.

For the reasons stated in Opinion and Order No. 29, we find that a price at the border of U.S. \$4.94 per MMBtu for this import is reasonable and not inconsistent with the public interest within the meaning of Section 3 of the Natural Gas Act. This approval shall be effective only so long as the border price upon which it is based does not exceed the current price of U.S. \$4.94 per MMBtu.

B. Need for the Gas

With respect to the need for the gas, the ProGas purchasers asserted in their original application that they

" . . . face the problem of a declining supply of gas from existing sources in the early 1980's and thereafter, and must replace such gas from a variety of sources if they are to be able to serve adequately the gas consumers of the areas they supply."

Tennessee and Tetco have recently been granted other authorizations to import natural gas. 16/ In our findings related to these authorizations, we cited the history of curtailments on these pipeline systems as an indication of adequate need. In this docket, three of the intervenors specifically cited a history of curtailments by their pipeline suppliers, Natural and Michigan Wisconsin. Furthermore, none of the intervenors (among them the Wisconsin Public Service Commission, other distributors, and other U.S. pipelines), oppose the ProGas purchasers' application. The record also shows that new sources of supply are needed by Tennessee and Tetco on those systems. 17/ Finally, while the size of the total import will be large by 1982 (300,000 Mcf/day), the gas is divided among four pipeline systems with diverse supplies, mainly from domestic sources. The ProGas volume, will represent only between two and three percent of the total pipeline supply for each of the four ProGas purchasers.18/

We conclude, therefore, that based on the record, there is adequate showing of need for this gas supply by Tennessee, Tetco, Natural, and Michigan Wisconsin to warrant approving the import at a reasonable price.

C. Incremental Pricing

PGC and AISI oppose any ERA decision to apply Title II NGPA incremental pricing to this import. The Gas Sales Agreement upon which this application is based was executed after May 1, 1978. Pursuant to Sections 203 and 207 of the NGPA, volumes imported pursuant to such contracts are subject to incremental pricing as a matter of law. ERA has no discretion with respect to these volumes.

V. Further Conditions

Recent decisions by the ERA 19/ have examined the relation-ship of import contract take-or-pay provisions and other import issues to the public interest

and have concluded that take-or-pay obligations such as those contained in the May 17, 1979, Gas Sales Agreements, as amended, raise serious questions as to whether they are necessary and not inconsistent with the public interest. Thus, while we approved in Opinion and Order No. 14B a new Canadian border price of U.S. \$4.47 per MMBtu, we also ordered further proceedings in the consolidated dockets covered by that decision (Dockets 80-01-NG, et al.) to examine the United States' dependence on natural gas imported from Canada and, in particular, to explore whether import authorizations should be conditioned in order to create an economic environment that would tend to discourage uneconomic and unnecessary reliance on imported natural gas.²⁰ One issue considered in those further proceedings is the extent to which take-or-pay obligations create an artificial demand for Canadian gas.

Many of the comments filed in above-referenced proceedings recommended that the Department seek a negotiated solution to the issues raised by ERA. We determined that many, if not all of these issues, could be resolved more easily in government-to-government discussions. As a result, we suspended further consideration of the issues in Docket Nos. 80-01-NG, et al., 79-08-NG, 79-24-NG, and 80-14-NG, pending the outcome of discussions with appropriate agencies of the Canadian Government.²¹

Our concerns about the "take-or-pay" issue and other issues relating to gas imports are important in this case as well. However, we do not believe it would be appropriate to order further proceedings at this time since we have suspended consideration of these issues in the other dockets pending discussions with Canadian authorities.

Furthermore, since the shipment of Natural's volumes through Northern Border is generally supportive of the objectives of the ANGTS pre-build program, we see value in ending the current uncertainty over regulatory approval of the ProGas project.

We reserve the right, however, pending the outcome of government-to-government discussions, to take additional action in this docket we determined that will parallel the reopened proceedings in the other Canadian import dockets cited previously. In the suspension orders issued December 16, 1980, we described the procedure for reopening those suspended proceedings:

"At the conclusion of the discussions, ERA will issue a proposed opinion and order outlining any agreed upon terms and conditions for continued Canadian imports and any preliminary determinations on the consistency of this proposal with the public interest. Before any final order is issued, the parties will be given an opportunity to comment on

the proposed opinion and order to demonstrate why ERA's preliminary assessment is or is not appropriate. Any necessary administrative proceedings will be held at this stage. Allowing public participation in the decision-making process in this manner will meet the procedural requirements of Section 3 of the Natural Gas Act." 22/

The parties are hereby placed on notice that any conditions subsequently adopted such as limiting operation of the take-or-pay provisions may be applied retroactively to the date of approval of the import if necessary and appropriate in the circumstances.

Order

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

A. Pursuant to Section 3 of the Natural Gas Act, and pursuant to the Gas Sales Agreement with ProGas Ltd., dated May 17, 1979, as amended, authorization is hereby granted to Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee), Texas Eastern Transmission Corporation (Tetco), Natural Gas Pipe Line Company of America (Natural), and Michigan Wisconsin Pipeline Company (Michigan Wisconsin), to import up to 225,000 Mcf per day of natural gas from Canada as follows:

1. Tennessee is authorized to import up to 75,000 Mcf per day through October 31, 1987.

2. Tetco is authorized to import up to 75,000 Mcf per day through October 31, 1987.

3. Beginning November 1, 1982, Michigan Wisconsin is authorized to import up to 75,000 Mcf per day through October 31, 1987.

4. Beginning November 1, 1982, Natural is authorized to import up to 75,000 Mcf per day through October 31, 1987, only in the event that it is unable to import its contractual volumes at Monchy, Saskatchewan.

B. Pursuant to Section 3 of the Natural Gas Act, Tennessee, Tetco, Natural, and Michigan Wisconsin are hereby authorized to import the volumes authorized in paragraph A above at a unit price not to exceed U.S. \$4.94 per MMBtu (U.S. \$4.17 per GJ).

C. Pursuant to Section 3 of the Natural Gas Act, the authorization granted herein is subject to such 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 April 24, 1981.

--Footnotes--

1/ Natural Gas Pipeline Company of America (Natural) Michigan Wisconsin Pipe Line Company (Michigan Wisconsin) Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee) Texas Eastern Transmission Company (Tetco)

2/ Notice of receipt of this application appeared in the Federal Register on July 19, 1979 (44 FR 42307).

3/ By subsequent amendment, conditions of delivery of gas for Michigan Wisconsin and Natural have been changed. See below.

4/ Notice of receipt of the supplement appeared in the Federal Register on February 11, 1981 (46 FR 11860).

5/ Authorization to approve the import of these volumes at Monchy is not within ERA jurisdiction. See Section III below.

6/ During the period to and including October 31, 1982, the take-or-pay provision remains unchanged (Daily Contract Quantity times number of days in the contract year times 0.85 equals Minimum Annual Quantity). Beginning November 1, 1982, the Minimum Annual Quantity is calculated by multiplying the Daily Contract Quantity times the number of days in the contract year times 0.85 times the "FERC factor." The FERC factor is fully described in the FERC's April 28, 1980, order cited above and is meant to eliminate a portion of the escalated dollar value of take-or-pay obligations. The Minimum Annual Quantity calculated in this way should not exceed 75 percent of the Daily Contract Quantity times the number of days in the contract year.

7/ Notice of receipt of the petition appeared in the Federal Register on February 12, 1981 (46 FR 32052).

8/ Public Service Commission of Wisconsin; Northwest Alaskan Pipeline Company; Midwestern Gas Transmission Company; Foothills Pipe Lines (Yukon) Ltd.; Algonquin Gas Transmission Company; Great Lakes Transmission Company; Public Service Electric and Gas Company; Northern Natural Gas Company, a Division of InterNorth, Inc.; Process Gas Consumers Group and the American Iron and Steel Institute; Northern States Power Company (Minnesota) and

Northern States Power Company (Wisconsin); Wisconsin Fuel and Light Company; New Jersey Natural Gas Company; Iowa Electric and Power Company; Iowa-Illinois Gas and Electric Company; TransCanada Pipe Lines Ltd.; Peoples Gas Light and Coke Company.

9/ Wisconsin Fuel and Light Company; New Jersey Natural Gas Company; Iowa Electric and Power Company; Iowa-Illinois Gas and Electric Company; TransCanada Pipe Lines Ltd.; Peoples Gas Light and Coke Company.

10/ 15 U.S.C. 3341-3348.

11/ Pub. L. 95-91, Sections 301(b) and 402(f), 42 U.S.C. 7151(b) and 7172(f).

12/ There are new facilities proposed for the imports through Emerson, specifically the construction by Michigan Wisconsin of pipeline looping facilities, and therefore, it is also necessary for the FERC to exercise its exclusive jurisdiction regarding facility construction and siting for imports.

13/ See FERC Docket Nos. CP79-332 and CP79-332-001.

14/ DOE has determined that granting authorization to import the requested volumes of natural gas at Emerson is not a major Federal action significantly affecting the quality of the human environment within the meaning of the Natural Environmental Policy Act of 1969 (42 U.S.C. Secs. 4321, et seq. (1976)). Therefore, neither an environmental impact statement nor an environmental assessment is required.

15/ DOE/ERA Opinion and Order No. 29, issued March 27, 1981, in ERA Docket Nos. 81-09-NG, et al., Pacific Gas Transmission Company, et al.

16/ 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) in which Border Gas, Inc. was granted authorization to import natural gas from Mexico for resale among others to Tennessee and Tetco as shareholders in @order Gas, Inc.; and DOE/ERA Opinion and Order No. 17 (Order 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).

17/ See, e.g., Petition of Tennessee Gas Pipeline Company, a Division of Tenneco Inc. and Texas Eastern Transmission Corporation for Temporary Authorizations, in ERA Docket No. 79-15-NG, filed January 23, 1981.

18/ Statement of ProGas Limited in Support of Joint Petition of the ProGas Purchasers for Conditional Authorization, filed July 8, 1980, at 3.

19/ See, e.g., DOE/ERA Opinion and Order No. 14B, issued May 15, 1980, in ERA Docket Nos. 80-01-NG, et al., Inter-City Minnesota Pipelines Ltd., Inc. (1 ERA para. 70,508, Federal Energy Guidelines).

20/ ERA issued on July 9, 1980, a Prehearing Order in Docket No. 80-01-NG, et al., Inter-City Minnesota Pipelines Ltd., Inc. (1 ERA para. 70,505 Federal Energy Guidelines), establishing further procedural steps, including the imposition of deadlines for the filing of written materials relating to certain policy, legal and factual issues. Similar further proceedings were also ordered in Order No. 17; DOE/ERA Opinion and Order No. 24, issued October 31, 1980, in ERA Docket No. 80-14-NG, Transcontinental Gas Pipe Line Corporation (1 ERA Para. 70,523 Federal Energy Guidelines); DOE/ERA Opinion and Order No. 19, issued August 29, 1980, in ERA Docket No. 79-24-NG, Northern Natural Gas Company (1 ERA Para. 70,518 Federal Energy Guidelines).

21/ Orders Suspending Consideration of Import Cases Pending Outcome of Inter-Governmental Discussions, issued on December 16, 1980, in Docket Nos. 80-01-NG, et al., 79-08-NG, 79-24-NG, and 80-14-NG.

22/ Ibid.