

Cited as "1 ERA Para. 70,512"

Transcontinental Gas Pipe Line Corporation and Tennessee Gas Pipeline  
(ERA Docket No. 79-08-NG), July 7, 1980

Order Conditionally Approving the Joint Application of Transcontinental  
Gas Pipeline Corporation and Tennessee Gas Pipeline Company to Import Certain  
Volumes of Canadian Natural Gas

[Opinion and Order]

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Summary

This Opinion and Order approves the joint application of Transcontinental Gas Pipe Line Corporation and Tennessee Gas Pipeline Company to import up to 75,000 Mcf of natural gas per day and 22,000,000 Mcf of natural gas per year at a price of \$4.47 per MMBtu for a limited term beginning with initial deliveries and ending on March 31, 1982, with an option for a further extension to November 1, 1982 upon mutual agreement of the parties. The approval is based upon our determination in Opinion and Order No. 14B that the price of \$4.47 per MMBtu is reasonable and upon our finding in this case that there has been an adequate showing of need for the gas. The authorization is subject to the incremental pricing provisions of Title II of the Natural Gas Policy Act of 1978. It is also subject to such conditions as ERA may determine, in further proceedings in this case (which will be consistent with the ongoing proceedings in the Canadian natural gas import cases, ERA Docket Nos. 80-01-NG, et al.), are necessary to prevent the

applicants' unnecessary and uneconomic reliance on Canadian gas.

## I. Background

On March 26, 1979, Transcontinental Gas Pipe Line Corporation (Transco) filed with the Economic Regulatory Administration an application pursuant to Section 3 of the Natural Gas Act to import up to 75,000 Mcf of natural gas per day and 22,000,000 Mcf of natural gas per year at the international border price as set from time to time by the Canadian Government for a limited term beginning with initial deliveries and ending on October 31, 1981, unless the period were extended to permit receipt of prepaid gas.<sup>1/</sup> Transco proposed to purchase this gas from Sulpetro Limited, a Canadian natural gas producer with fields in Alberta. The gas would be transported through existing pipeline facilities of Alberta Gas Truck Line Company Limited and TransCanada Pipelines Limited. It would enter the United States at a point near Niagara Falls, New York, by means of existing pipeline facilities owned and operated by Tennessee Gas Pipeline Company, a Division of Tenneco, Inc. (Tennessee).

Under its gas purchase contract with Sulpetro, Transco is required to take or pay for a minimum quantity of 53,000 Mcf per day, with certain seasonal variations. Transco is given a two-year make-up period to take gas paid for but not previously taken ("prepaid gas"). The contract further provides that if, upon expiration of the term of the contract, Transco is unable to recover all of the prepaid gas, Sulpetro would refund the average price per MMBtu for gas delivered during the contract year in which the prepaid gas was offered but not taken.

In its application, Transco cited "the serious gas shortage which has faced consumers served by Transco over the past several years" as evidence of the need for the gas proposed to be imported. Transco reported serious curtailments between 1976 and 1978, noting although its "gas supply situation has stabilized and some improvement is expected during the near-term future, there is a continuing need to augment such supplies." <sup>2/</sup>

On November 20, 1979, Transco and Tennessee filed with ERA an amendment to the initial application, adding Tennessee as a purchaser and importer of fifty percent of the gas sought to be imported.<sup>3/</sup> This amendment also gave notice of contract amendments dated June 20, 1979. These amendments extend the primary term of the contract to March 31, 1982, with an option for a further extension to November 1, 1982 upon mutual agreement of the parties. They also reduce the minimum take requirements to ninety percent of the quantities set forth in the original contract. With regard to the question of Tennessee's need for the gas, the November 20 filing stated that "Tennessee, due to a lack

of gas supply, is presently curtailing deliveries to its customers on a systemwide basis." 4/

On December 6, 1979, the Canadian National Energy Board approved Sulpetro's proposed export to Transco and Tennessee. Shortly thereafter, on January 11, 1980, Sulpetro filed the first of two motions for expedited procedures and immediate decision. This motion informed ERA that Sulpetro was prepared to provide Transco and Tennessee needed gas immediately upon requisite approval from the United States Government. It further noted that the proposed importation would be consistent with the Alaska Natural Gas Transportation System pre-build project, in that this importation will allow Sulpetro to develop other reserves to flow through the pre-build project, once it is built.

Sulpetro's second motion for expedited procedures and immediate decision was filed on May 23, 1980. In this motion, Sulpetro argued that its case was distinguishable from those under consideration in ERA Opinion and Order Nos. 14, 14A, and 14B, in which ERA raised broad policy questions about potentially unnecessary and uneconomic overreliance on natural gas imported from Canada, and ordered further proceedings to explore means of conditioning such authorizations to reduce overdependence on imports.<sup>5/</sup>

In the motion of May 23, Sulpetro observed that the instant application involves de minimus volumes and is supportive of the pre-build project. It pointed out that it has invested \$46,703,000 in facilities for the export to Transco and Tennessee, and that as a small producer, Sulpetro is hard pressed to recover the capital costs as soon as possible. It contended that its take-or-pay provision provides that Sulpetro has the obligation, upon expiration of the term of the agreement, to refund to the buyer all amounts of money that the buyer paid out under the take-or-pay clause. For all of these reasons, Sulpetro argued that its case is distinguishable from those in Opinion and Order Nos. 14, 14A, and 14B.

Nonetheless, the second motion indicated that in order to receive prompt approval of its sale to Transco and Tennessee, Sulpetro--

stands willing to commence export of those volumes on a conditional basis, should ERA/FERC determine, notwithstanding the points enumerated above, that it is in the public interest of the United States to require a uniformity of approach in this proceeding and the proceedings covered by Order No. 14-B.<sup>6/</sup>

## II. Comments

Of the intervenors in this proceeding,<sup>7/</sup> only Midwestern Gas Transmission Company (Midwestern) and the Public Service Commission of the State of New York (New York) offered comments. In its petition to intervene, Midwestern expressed concern that the Canadian export license upon which it relied for sixty percent of the gas supplies for its northern system was to expire in 1980 and that further volumes of Canadian gas for Midwestern might be jeopardized by the exports contemplated in this proceeding. Subsequent events, however, have proven Midwestern's concerns unfounded. On December 6, 1979, the Canadian National Energy Board issued not only the license for the export of natural gas to Transco and Tennessee, but also the license upon which Midwestern was relying.

New York stated in its notice of intervention that it "questions this application in view of the recent action of the Canadian Government to increase the price of natural gas exported to the United States to \$4.47 per MMBtu." <sup>8/</sup> New York observed that the \$4.47 price was not at that time (February 7, 1980) competitive with alternative fuel supplies. In light of the high price of the proposed import, New York called for a more detailed showing of need for the gas before ERA makes a final decision.

### III. Decision

In Opinion and Order No. 14B, dated May 15, 1980, we determined that the present \$4.47 per MMBtu border price for Canadian natural gas is reasonable, based on a comparison of the border price with average selected alternate fuel prices in the United States between April 8 and May 8, 1980. At that time, however, we ordered further proceedings with regard to all flowing gas (ERA Docket Nos. 80-01-NG, et al.) to examine the question of United States dependence on natural gas imported from Canada and, in particular, to explore means of conditioning import authorization in order to discourage uneconomic and unnecessary reliance on imported natural gas. Because take-or-pay type obligations in contracts with Canadian suppliers may operate to force United States pipelines to purchase imported gas when less expensive domestic supplies may be available, thus thwarting our policy of viewing imported gas as a marginal supply that should be priced competitively with alternate fuels, we expressed special interest in developing a full record on take-or-pay issues. Similarly, recent decisions of the Federal Energy Regulatory Commission in proceedings involving pre-build of the Eastern Leg of the Alaskan Natural Gas Transportation System (Northern Border),<sup>9/</sup> limiting take-or-pay obligations in contracts at issue there and commending this issue to ERA for further consideration in cases involving other imports, add to the focus on "take-or-pay" contract provisions in the proceedings in Docket Nos. 80-01-NG, et al.

The policy and precedent emerging from the ongoing ERA and FERC proceedings in the Canadian import cases are likely to bear upon this case now before us. Therefore, the decision we reach today is conditional, to the extent that we reserve the right to hold further proceedings and impose additional conditions in this case as may be necessary to conform with the policy and precedent flowing from the ongoing proceedings. This is consistent with the approach proposed by Sulpetro in its second motion for expedited procedures.

ERA's responsibility under Section 3 of the Natural Gas Act, as delegated by the Secretary of Energy,<sup>10/</sup> is to determine whether natural gas imports and exports are not inconsistent with the public interest, based on certain considerations. In exercising this responsibility, the Administrator has the authority to review and determine certain issues, including, but not limited to, national and regional need for the gas to be imported and the proposed price to be charged at the border.

In Opinion and Order No. 14B, it was established that the present border price of \$4.47 per MMBtu is in fact a reasonable price, compared with the cost of alternate fuels. Thus, notwithstanding the comments of New York (which were filed three months prior to the issuance of Opinion and Order No. 14B) that the gas proposed to be imported by Transco and Tennessee is unreasonably expensive, we conclude that the price proposed in this application is at the present time reasonable.

Moreover, we are satisfied that Transco and Tennessee have made an adequate showing of need for the gas. Both applicants have had a troublesome history of curtailment in recent years. Although New York expressed skepticism regarding the need for the gas at a price which it considered at the time to be unreasonable, there is clearly a need in this case for supplemental supplies of gas at competitive prices, particularly since certain safeguards are present to subject the imported gas to market factors. For example, pursuant to Section 203(a)(5) of the Natural Gas Policy Act of 1978, new natural gas imports are subject to the incremental pricing provisions of Title II of the Act, as implemented by FERC regulations. Thus the Title II passthrough requirements for first sale acquisition costs will be applied to this importation. In addition, we will continue this proceeding to determine whether the take-or-pay provisions of the purchase contract should be modified to avoid creating an artificial market for this high-cost supplemental supply of natural gas.

Accordingly, we hereby grant the application of Transco and Tennessee in this docket, subject to the conditions set forth below and to such conditions

as may result from further proceedings in this case consistent with the determinations reached in Docket Nos. 80-01-NG, et al.

#### IV. Further Proceedings

Both the FERC in its Northern Border decisions and the ERA in its recent decisions in Docket Nos. 80-01-NG, et al. have questioned whether the take-or-pay obligations imposed on United States pipelines importing Canadian natural gas are in the public interest. We note that in the contract under consideration in this particular application, Sulpetro allows flexible make-up provisions for gas paid for but not taken, and will reimburse the importers for prepaid gas not taken by the end of the contract term. Insofar as these clauses are concerned, the take-or-pay provisions in this contract are commendable in terms of flexibility and fairness.

Nonetheless, the inherent policy problems raised by ERA and the FERC are present in this case. We stated in Opinion and Order No. 14B that:

all such clauses are tied to the escalating commodity price and operate to create an artificial market for costly Canadian gas. The contract provisions obligate U.S. purchasers to find a market for Canadian gas regardless of prices of domestic gas or alternative fuels thus undermining the policies that imported natural gas should be priced competitively with alternative fuels and that natural gas imports constitute marginal gas supplies. [Footnote omitted] Further, take-or-pay or demand/commodity charges that are tied to the cost of imported natural gas (which in turn escalate with the cost of Canadian oil imports) arguably go beyond their legitimate function of providing an assured minimum cash flow to Canadian gas producers and transporters.<sup>11/</sup>

While the contract term here is so short and the volume of these supplemental gas supplies is so small that it is unlikely that either applicant would have to pay for gas under the contract which it could not take, nonetheless there is value in treating take-or-pay provisions uniformly, especially if there is no public interest in not doing so. Therefore while we are approving this proposed import, we hereby order further proceedings in this case, which will parallel the proceedings in Docket Nos. 80-01-NG, et al., to determine whether our approval of the import should be conditioned in such a way as to prevent unnecessary and uneconomic reliance by these applicants on high-priced Canadian gas supplies.<sup>12/</sup> The parties are hereby placed on notice that conditions subsequently adopted to limit 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.

Further, if Transco's or Tennessee's prevailing market conditions indicate that need for this imported gas is reduced, we would expect the applicants to employ prudent management of their gas supplies. We would expect them to avoid taking costly Canadian imports beyond what is required by the take-or-pay provisions, as they currently exist in the contracts or as they may subsequently be modified in further proceedings, when adequate domestic supplies are available.

### Order

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

A. Pursuant to Section 3 of the Natural Gas Act, authorization is hereby granted, effective immediately, to Transcontinental Gas Pipe Line Corporation and Tennessee Gas Pipeline Company to import up to 75,000 Mcf of natural gas per day and 22,000,000 Mcf of natural gas per year at a price not to exceed U.S. \$4.47 per MMBtu (U.S. \$4.17 per GJ) through November 1, 1982, pursuant to the terms of their sales contract with Sulpetro Limited of Canada.

B. 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, consistent with the ongoing proceedings in the Canadian natural gas import cases, ERA Docket Nos. 80-01-NG, et al. Applicants and intervenors in this proceeding shall be bound by opinions and orders issued in further proceedings in this case.

C. The petitions for leave to intervene, as set forth in the Appendix to this Opinion and Order, are hereby granted, subject to such rules of practice and procedure as may be in effect, provided that their participation shall be limited to matters affecting asserted rights and interests specifically set forth in their petitions for leave to intervene and that the admission of such intervenors shall not be construed as recognition by ERA that they might be aggrieved because of any order issued by ERA in this proceeding.

Issued in Washington, D.C., July 7, 1980.

--Footnotes--

1/ ERA noticed this application in the Federal Register on April 4, 1979 (44 F.R. 21,697).

2/ Transcontinental Gas Pipe Line Corporation, Application for an Order Authorizing the Limited-Term Importation of Natural Gas from Canada into the

United States (ERA Docket No. 79-08-NG, March 26, 1979), at 4.

3/ ERA noticed this amendment to the application in the Federal Register on January 23, 1980 (45 F.R. 5,364).

4/ Transcontinental Gas Pipe Line Company and Tennessee Gas Pipeline Company, Amendment to Application for an Order Authorizing the Limited-Term Importation of Natural Gas from Canada into the United States (ERA Docket No. 79-08-NG, November 20, 1979), at 3.

5/ Inter-City Minnesota Pipelines Ltd., et al. (ERA Docket Nos. 80-01-NG, et al., February 16, 1980; April 23, 1980; May 15, 1980).

6/ Sulpetro Limited, Second Motion of Sulpetro Limited for Expedited Procedures and Immediate Decision (ERA Docket No. 79-08-NG, May 23, 1980), at 6.

7/ Petitions to intervene were filed by the following:

Brooklyn Union Gas Company

Consolidated Edison Company of New York

Great Lakes Transmission Company

Long Island Lighting Company

Midwestern Gas Transmission Company

Northern Natural Gas Company

Philadelphia Gas Works

Piedmont Natural Gas Company, Inc.

Public Service Commission of the State of New York

Public Service Electric & Gas Company

Sulpetro Limited

Tennessee Gas Pipe Line Company (Tennessee Gas Transmission Company)



TransCanada Pipelines Limited

In the absence of any objections, the petitions to intervene are granted herein.

8/ Public Service Commission of the State of New York, Notice of Intervention of the Public Service Commission of the State of New York (ERA Docket No. 79-08-NG, February 7, 1980), at 1.

9/ FERC Order of April 28, 1980 in Northwest Alaskan Pipeline Company, Docket Nos. CP-78-123, et al., at 55-64; FERC Order of June 20, 1980 in the same docket.

10/ Sections 301 and 402(f) of the Department of Energy Organization Act (Pub. L. No. 95-91) give the Secretary of Energy the authority to authorize the import or export of natural gas pursuant to Section 3 of the Natural Gas Act. The Secretary delegated this responsibility to the Administrator of the ERA on October 1, 1977 (42 F.R. 50,724). Later, the Secretary issued two delegation orders redefining the areas of jurisdiction between ERA and FERC in deciding applications to import natural gas (DOE Delegation Order Nos. 0204-54 and 0204-55, 44 D.R. 56,735, October 2, 1979).

11/ Opinion and Order No. 14B, supra, note 5, at 21.

12/ ERA intends to issue shortly a prehearing order in Docket Nos. 80-01-NG, et al., establishing further procedural steps, including the imposition of deadlines for the filing of written materials relating to certain policy, legal and factual issues that will be spelled out in the order. A similar prehearing order will be issued for this proceeding.

ERA DOCKET NO. 79-08-NG

Appendix (Service List)

DATE FILED	APPLICANTS	REPRESENTATIVES
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