Cited as "1 ERA Para. 70,573"

Transcontinental Gas Pipe Line Corporation (ERA Docket No. 84-06-NG), October 31, 1984.

DOE/ERA Opinion and Order No. 46A

Order Granting Amendments to Conditional Authorization to Import Natural Gas from Canada and Granting Intervention

I. Background

On July 19, 1984, Transcontinental Gas Pipe Line Corporation (Transco) filed an application with the Economic Regulatory Administration (ERA) of the Department of Energy (DOE), pursuant to Section 3 of the Natural Gas Act, to amend an existing natural gas import authorization granted September 16, 1982, in DOE/ERA Opinion and Order No. 46 (Order 46).1/ Transco requested that the authorization be amended to reflect revisions to its gas purchase contract negotiated with its Canadian supplier, Sulpetro Limited (Sulpetro), on June 28, 1984.

In Order 46, Transco was conditionally authorized to import natural gas from Sulpetro for an eight-year period ending October 31, 1991, under a gas sale contract dated December 31, 1980. The original agreement provided for the sale of a maximum daily quantity of 75,000 Mcf through October 31, 1987, and 15,000 Mcf per day less each year for the remaining four contract years, with a 75 percent take-or-pay obligation. The contract set the price at the rate prescribed by the Canadian Government for gas exported to the United States. Order 46 authorized an import price not to exceed U.S. $4.94 per MMBtu, the border price at that time. The volumes purchased by Transco currently enter the United States at Niagara Falls, New York, through pipeline facilities owned and operated by Tennessee Gas Pipeline Company and, as needed, through the facilities of Consolidated Gas Supply Corporation. Transco intends that these interim transportation services continue until new pipeline facilities proposed by the Niagara Interstate Pipeline System (NIPS) are constructed.2/ Initial deliveries through the NIPS pipeline are contemplated to begin by November 1, 1987.

The approval in Order 46 was limited to Transco's use of existing pipeline facilities to deliver the gas. The importation of volumes through facilities not yet constructed was conditioned upon the issuance of a final opinion and order after an environmental review is completed.3/

By the revised agreement of June 28, 1984, Transco's purchases from Sulpetro will rise to 125,000 Mcf of gas per day starting November 1, 1987, with no stepdown in volumes during the later years of the import. Moreover, Transco and Sulpetro agreed to extend the term of the import through October 31, 1994. This will increase the total volumes available for importation by 250 Bcf.4/

The new agreement also provides that beginning November 1, 1984, the import price will be determined according to a two-part rate consisting of (1) a monthly demand charge of $18.24 per Mcf, subject to adjustment to equal the demand charge that Sulpetro will pay TransCanada PipeLines Limited for transporting the gas sold to Transco, and (2) a commodity charge subject to monthly adjustment pursuant to a formula based on equally weighted changes in the prices of No. 2 distillate oil and No. 6 residual oil in New York Harbor published in Platt's Oilgram, resulting in a market competitive price. The amendment establishes a benchmark commodity price for May 1984 of approximately $2.83 per MMBtu, from which future adjustments will be calculated. According to Transco, at 100 percent load factor, that price would yield a cost at the international border of $3.43 per MMBtu. At 70 percent load factor, the effective price for May 1984 would be $3.69 per MMBtu. To ensure the marketability of the gas, Transco and Sulpetro will meet every two years to renegotiate the contract pricing terms, including the price level, the price adjustment formula and the rate structure. Either party may request additional price redeterminations if the base values last used in establishing the demand and commodity rates increase or decrease by more than 5 percent.

Under the amended agreement, the take-or-pay obligation is reduced to 70 percent of the contract demand, although Transco and Sulpetro have agreed to cooperate in resolving any economic hardships if Transco is unable to achieve the 70 percent take level during the contract years ending October 31, 1986. Further, the amendment provides that Transco may purchase gas dedicated to the contract either for its system supply or for direct sale to its customers, both direct and indirect. The ability to make purchases on behalf of customers as well as for system supply represents a new feature in Transco's import arrangement, and is a significant modification to its existing authorization. The requested amendments are to become effective upon receipt of all necessary United States and Canadian governmental approvals.

In support of its application, Transco asserted that the new contract provisions will improve flexibility and responsiveness to market changes and are consistent with the Secretary of Energy's new policy guidelines for the importation of natural gas.5/ In particular, Transco noted that the new demand/commodity pricing structure adopted in the amended agreement effects a

significant price reduction and is sensitive to changes in prices of relevant competing fuels. Transco also stated that the additional volumes of gas will enhance delivery capability and offset the anticipated declining supply of natural gas from existing domestic sources.

II. Interventions and Procedural Motions

On July 27, 1984, the ERA issued a notice of Transco's application, inviting protests or motions to intervene, which were to be filed by September 5, 1984.6/

The ERA has received eight timely motions to intervene and two late motions from Foothills Pipe Lines (Yukon) Ltd. (Foothills) and Northern Border Pipeline Company (Northern Border) which were filed on October 5, and October 21, 1984, respectively.7/ There was no opposition to any of the motions for intervention. Further, with regard to Foothills' and Northern Border's late filings, no delay to the proceeding or prejudice to any party will result from their being granted intervention. Accordingly, the late filings are accepted and this order grants all motions to intervene.

None of the intervenors opposed Transco's application or expressed an opinion on its merits with regard to the issue of the competitiveness of the import arrangement. In its intervention, Ohio Interstate Pipeline Company (Ohio Interstate), which is sponsoring a project competitive with NIPS and TransCanada Pipeline Ltd.'s proposal for transporting Canadian gas for export at Niagara Falls (including Transco's import volumes), requested that the ERA adopt procedures to evaluate the cost benefits of its alternative for delivering that gas to northeastern markets by means of a United States west-to-east pipeline route (the U.S. Route).8/

Foothills, a Canadian natural gas pipeline company which owns and operates the prebuild Canadian segments of the ANGTS, did not generally object to the issuance of the authorization requested by Transco. However, as the proposed Canadian transporter of new imports using the prebuild ANGTS facilities under both the U.S. Route and MIDCON projects, Foothills requested that to the extent the authorization pertains to imports which will involve the construction of new domestic facilities, it should be conditioned to require further review following a decision by the FERC on the transportation alternatives being considered in Boundary Gas, Inc., et al. In addition, Foothills asserted that the conditional authorization should not approve Niagara Falls or any other delivery point as the place of entry for those imports which will involve the construction of new domestic facilities because the FERC has exclusive jurisdiction to initially determine the place

of entry for such imports.

Northern Border, a sponsor of the U.S. Route pipeline project, did not oppose approval of additional Canadian imports by Transco, but requested that final authorization be deferred until the FERC and NEB have completed their separate proceedings on the competing proposals to transport gas from Canada. Northern Border asserts that the NEB and FERC approvals could require amendments to the terms of Transco's gas purchase contract. Furthermore, it contends that the FERC has the exclusive authority to determine the point of import where certification and construction of new U.S. pipeline facilities are involved.

Brooklyn Union Gas Company (Brooklyn Union), a distributor customer of Transco, commented on the revised contract provision permitting Transco the option of purchasing Canadian gas on behalf of its customers rather than for its own system supply. Brooklyn Union requested that any authorization issued herein be conditioned to require Transco to provide the ERA with specific information regarding each proposed purchase of gas on behalf of a direct or indirect customer, and that before the import takes place, public notice be given inviting comments on each proposed transaction.

By letter dated October 22, 1984, Transco informed the ERA that Brooklyn Union's concerns about Transco's proposed marketing flexibility had been satisfactorily resolved by the parties and the request for conditional authorization was withdrawn. However, according to Transco, Brooklyn Union's agreement to the resolution was contingent upon its continuing to qualify as an eligible participant in spot market arrangements on Transco's system. If and when it no longer qualifies, Transco stated that Brooklyn Union requested that the flexible marketing authority be suspended until the question of eligibility to participate is resolved through further negotiations with Transco or further proceedings before the ERA. Transco agreed to such a limitation. On October 25, 1984, Brooklyn Union stated in a letter that Transco accurately represented their position on this matter.

On October 19, 1984, Ohio Interstate, pursuant to Section 590.302 of the ERA's procedural rules, filed a motion requesting that the ERA condition final approval of Transco's application with respect to volumes to be transported through NIPS on the outcome of the NEB and FERC proceedings.9/ Ohio Interstate contends that after those proceedings are concluded and the appropriate facilities have been certified to deliver the gas involved, the ERA will be better able to determine whether to exercise its authority to disapprove the designated point of entry for the import. The firm also filed a motion under Section 590.312 requesting the opportunity to make an oral presentation to

address this issue, unless the motion is granted without such presentation.

III. Response to the Comments and Motions

Foothills and Northern Border, in their motions to intervene, and Ohio Interstate, in a separate motion, requested that we await the outcome of the ongoing NEB and FERC proceedings on the competing proposals to transport Canadian gas to the northeastern U.S. before giving final approval for Transco to import Sulpetro volumes that would be shipped through NIPS. Ohio Interstate also requested that we conduct additional proceedings in this docket to examine the cost benefits of its proposed transportation alternative for delivery of this gas.

The parties have made motions and requests pertaining to matters that the Secretary of Energy has delegated to the FERC,10/ and that are presently and appropriately being considered by the FERC.11/ We are therefore denying each of these requests.

We are concerned with the competitiveness of an import arrangement. Despite requesting that we defer final approval of this application until we have reviewed the results of the NEB and FERC proceedings, the parties have not demonstrated that there is any reason to believe that this import arrangement will cease to be competitive at the time the gas begins to flow through the new facilities. The arrangement is structured in a way that allows it to remain competitive over the life of the contract through price adjustments and renegotiation provisions. The parties have not indicated how the FERC or NEB selection of one particular transportation route over another will so affect the import arrangement that it will not be responsive to the market.

Should the adjustment mechanisms in this contract fail to allow appropriate responses to the marketplace, as a consequence to decisions on transportation alternatives, the parties have appropriate remedies available to them before this agency, and others. Further, should decisions on transportation require Transco to amend its authorization, parties would have the opportunity to comment on any new arrangement at that time. There is no need to condition the authorization to anticipate speculative and unlikely impacts of decisions yet to be made.

Brooklyn Union first sought to require a proceeding prior to each purchase by Transco on behalf of its customers. It has since reached a settlement with Transco and now seeks a condition in Transco's authorization that would suspend imports on behalf of Transco's direct and indirect

customers only if Brooklyn Union no longer qualifies as an eligible participant in spot market arrangements on Transco's system.

While Transco and Brooklyn Union have resolved Brooklyn Union's immediate concerns, the type of condition proposed would run afoul of the goals and objectives of the policy of this agency, as promulgated by the Secretary of Energy last February. That policy, which provides guidelines for the review of gas import applications, places a premium on the ability of commercial parties to craft import arrangements with a minimum of governmental obstacles and interference. In establishing the regulatory considerations for assessing whether a proposed gas import is in the public interest, the on-going competitiveness of the proposed import arrangement is the paramount regulatory issue. The test for an import arrangement is that it be buyer-seller negotiated and that its terms insure that the gas will be supplied on a competitive basis over the duration of the contract. Under this policy, the government defers to the workings of the marker for the selling price, recognizing that buyers and sellers will optimize the benefits for the parties involved.

Transco has proposed a creative approach to the needs and opportunities of its market. It has negotiated an import arrangement that provides a supplemental and competitively priced gas supply to its overall system. It has also seized an opportunity to make direct sales of part of its imported volumes. Such sales allow Transco to utilize gas not needed for system requirements to serve specific customer needs in its market. This additionally, gives Transco the flexibility to manage its overall supply in the most competitive manner.

No intervenor, including Brooklyn Union, raised any questions or objections about the competitiveness of the Transco's import supply arrangement. The arrangement includes a price calculated to remain competitive with alternative energy sources in the markets Transco will serve with this gas. Presumably this price will be competitive whether utilized in system-wide sales or in direct sales transactions. In view of this, there is no obvious rationale for suspending Transco's flexible marketing authority or for further proceedings if Brooklyn Union's status as a customer changes.

To suspend Transco's authority to import gas for direct sales upon such an occurrence would inject the government unnecessarily into the workings of the market and impose the very type of regulatory hurdle that this agency has sought to remove. This proceeding has addressed the question of the public interest of Tranco's import arrangement and has found that the gas Transco wishes to import will provide a competitive supply of energy. The agreement

reached by Transco and Brooklyn Union represents the kind of accommodation we would expect the marketplace to make. Further, any concerns surrounding possible changes in Brooklyn Union's eligibility as a customer in Transco's spot marketing programs are appropriately a matter for the two parties to resolve.

For these reasons, Brooklyn Union's request to condition Transco's authorization on Brooklyn Union's ability to qualify for Transco's spot marketing programs is denied. Spot and direct sales of gas are a new and expanding area of activity in the natural gas industry and signal the opening of gas markets to greater competition. To the extent that imported gas is available and can compete in the spot and direct sales markets, U.S. consumers benefit.

IV. Environmental Determination

As previously explained in Order 46, this import involves two separate transportation arrangements. Under the first arrangement, the gas is being transported by Tennessee and Consolidated through their existing U.S. pipeline facilities until the initiation of service on the proposed NIPS facilities, expected to be in operation by November 1, 1987. Thereafter, transportation services will be provided through October 31, 1994, on the proposed NIPS facilities, the certification of which is presently pending at the FERC. Our decision in Order 46 was final to the extent Tennessee or Consolidated delivers the import volumes through existing facilities.12/ With respect to those volumes utilizing facilities yet to be constructed, approval was conditioned upon subsequent completion of an environmental analysis of the new pipeline project and the issuance of a final opinion and order. Accordingly, this same condition adopted in the earlier proceeding continues to apply to the import authorization as amended by this order.

V. Decision

Transco's application has been evaluated in accordance with the Administrator's authority to determine if the proposed import arrangement meets the public interest requirements of Section 3 of the Natural Gas Act. The Administrator is guided by the Secretary of Energy's policy relating to the regulation of natural gas imports. Under these policy guidelines, the competitiveness of an import arrangement in the markets served is the primary consideration for meeting the public interest test.

No single element of an import arrangement determines its competitiveness. Rather, each contractual arrangement is considered in its

entirety. The project as presently structured (1) provides that the price of the imported natural gas will be competitive with the prices of major alternate fuels in the area served by Transco, and (2) enables Transco to reopen the contract every two years to adapt the contractual sales price to market conditions at the time. Specifically, Transco asserts that the monthly commodity pricing formula of an average of No. 2 and No. 6 fuel oils is sensitive to changes in prices of relevant competing fuels. Furthermore, when the pricing terms are renegotiated, the contract requires the seller and buyer to

> . . . have regard to prevailing prices of natural gas and alternative forms of energy which are competitively and incrementally available and to the premium quality of natural gas less the cost of transportation and any other transportation and distribution costs. . . .13/

In addition, the contract arrangement allows Transco greater flexibility, because of reduced take-or-pay requirements, to use other, cheaper sources of gas as they become available. Transco has satisfactorily demonstrated that its renegotiated gas purchase contract is sufficiently flexible, when viewed as a whole, to enable it to respond to its markets.

Some of the flexibility of this import arrangement is due to the operation of a spot sales mechanism. Spot sales are new to the natural gas industry, and raise new issues for consideration. There are other spot sales transactions before us in other proceedings, and we anticipate more applications in the future. We are putting the parties on notice that there may be need in the future to revisit the spot sale issue in this case in light of decisions made in other proceedings on spot sales.

After taking into consideration all information in the record of this proceeding, I find that Transco's import arrangement is competitive and fulfills the policy objectives of the Secretary of Energy. Accordingly, approval of the present application is not inconsistent with the public interest and should be granted.

Order

For the reasons set forth above, pursuant to Section 3 of the Natural Gas Act, it is hereby ordered that:

A. The import authorization previously granted to Transcontinental Gas Pipe Line Corporation (Transco) by DOE/ERA Opinion and Order No. 46 (Order

46) issued September 16, 1982, in ERA Docket No. 81-30-NG, is hereby amended to (1) extend it for an additional three years, until October 31, 1994, and (2) permit Transco to import up to 125,000 Mcf of Canadian gas per day during the period beginning November 1, 1987, through October 31, 1994, in accordance with the terms and conditions of Transco's amended gas purchase agreement with Sulpetro Limited dated June 28, 1984.

B. Ordering Paragraph B of Order 46 is hereby deleted.

C. In Ordering Paragraph C of Order 46, the phrase "Trans-Niagara Pipeline" is hereby amended to read "Niagara Interstate Pipeline System or any competitive alternative pipeline."

D. With respect to the natural gas authorized by Order 46, as amended herein, Transco shall file with the ERA in the month following each calendar quarter, quarterly reports showing, by month, the quantities of gas imported and the average price paid per MMBtu. Such reports shall include, as a separate item, identification of purchases made on behalf of Transco's direct or indirect customers and their applicable import price.

E. Except as modified by Ordering Paragraphs A, B, C, and D, all other terms and conditions in Order 46 shall continue to apply to the imports authorized herein.

F. The motions for leave to intervene, as set forth in this Opinion and Order, are hereby granted, subject to the administrative procedures in 10 CFR Part 590, provided that participation of the intervenors shall be limited to matters affecting asserted rights and interests specifically set forth in their motion for leave to intervene and not herein specifically denied, and that the admission of such intervenors shall not be construed as recognition that they might be aggrieved because of any order issued in these proceedings.

G. The motions to defer final approval on the non-environmental aspects of the import, or to hold further proceedings, are denied.

Issued in Washington, D.C., October 31, 1984.

--Footnotes--

1/ DOE/ERA Opinion and Order No. 46, issued on September 16, 1982, in ERA Docket No. 81-30-NG, Transcontinental Gas Pipe Line Corporation (1 ERA Para. 70,540, Federal Energy Guidelines).

2/ An application requesting authority to construct and operate this pipeline is currently pending at the Federal Energy Regulatory Commission (FERC) in Docket Nos. CP83-170-000 and CP83-170-001.

3/ Transco's present proposal modifies the proposal filed in Docket No. 81-30-NG which contemplated importing Canadian gas at Niagara Falls through a new Trans-Niagara Pipeline currently pending before the FERC in Docket No. CP82-125-003, as amended in Docket No. CP82-125-004.

4/ Inasmuch as Transco and Sulpetro do not presently have transportation arrangements for the additional 50,000 Mcf per day of contract demand, the agreement provides that the additional 250 Bcf dedicated to the contract shall expire (and the quantities shall revert to the previous levels) if either Transco or Sulpetro is unable to effectuate increased transportation arrangements by April 1, 1988. Also, the contract term would revert to the previous termination date of October 31, 1991.

5/ 49 FR 6684, February 22, 1984.

6/ 49 FR 31322, August 6, 1984.

7/ Motions were filed by The Brooklyn Union Gas Company, Ohio Interstate Pipeline Company, Columbia Gas Transmission Corporation, Tennessee Gas Pipeline Company, TransCanada PipeLines Limited, North Carolina Natural Gas Corporation, Northern Border Pipeline Company, Foothills Pipe Lines Ltd., Public Service Company of North Carolina, Inc., and Washington Gas Light Company and Frederick Gas Company, Inc. (joint movants).

8/ The NIPS application along with other applications involving construction of facilities, transportation and sales arrangements relating to imports at Niagara Falls are currently pending before the FERC in the consolidated proceedings of Boundary Gas, Inc., et al. Docket Los. CP-81-107-000, et al. TransCanada Pipelines Ltd. presently has pending before the Canadian National Energy Board (NEB) an application to expand its pipeline system in order to transport Alberta gas by a Canadian route to eastern U.S. markets. The gas would be transported eastward by TransCanada, Great Lakes Gas Transmission Company and Union Gas Limited to an interconnection with the proposed NIPS facilities. A competing proposal to that of TransCanada for the transmission of Canadian gas to the U.S. market has been filed with the NEB by Foothills. In addition to being considered in consolidated proceedings before the FERC, the U.S. Route, NIPS and a third competing project known as the MIDCONtinental Transportation System (MIDCON) will be heard on a consolidated basis by the NEB. See August 20, 1984, Report

of NEB Pursuant to s. 14(1) of the NEB Act.

9/ The same motion was filed in the following other proceedings pending before the ERA involving imports through the proposed NIPS facilities: Transcontinental Gas Pipeline Corporation, et al., Docket No. 81-02-NG; Transcontinental Gas Pipe Line Corporation, Docket No. 81-29-NG; Texas Eastern Transmission Corporation, Docket Nos. 82-05-NG and 82-07-NG; and Tennessee Gas Pipeline Company, Docket No. 82-10-NG.

10/ See Delegation Order No. 0204-112, (49 FR 6690, February 22, 1984).

11/ See "Order Consolidating Applications, Prescribing Hearing and Granting Petitions to Intervene," issued on October 2, 1984, by FERC in Boundary Gas, Inc., et al.

12/ Since no new construction was required for this service, the DOE determined that granting the authorization to import the requested volumes of natural gas was not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act.

13/ Application of Transcontinental Gas Pipeline Corporation to Amend Import Authorization, ERA Docket No. 84-06-NG, July 20, 1984, Appendix A, p. 6.