Cited as "1 ERA Para. 70,129"

Distrigas Corporation (ERA Docket No. 88-05-LNG), March 4, 1988.

DOE/ERA Opinion and Order No. 228

Order granting amended authorization to import liquefied natural gas from Algeria, imposing conditions, and granting interventions

I. Background

On January 28, 1988, Distrigas Corporation (Distrigas) filed an application with the Economic Regulatory Administration (ERA) of the Department of Energy (DOE), pursuant to Section 3 of the Natural Gas Act (NGA), to amend an existing liquefied natural gas (LNG) import authorization. Distrigas is requesting that it be allowed to purchase and import five cargoes of LNG from Algeria prior to May 15, 1988, at prices lower than are currently authorized.

ERA granted authorization to Distrigas on December 31, 1977, in ERA Docket No. 77-011-LNG,1/ allowing Distrigas to import Algerian LNG pursuant to an April 13, 1976, sales and purchase agreement (1976 agreement) between Distrigas and Sonatrach, the Algerian national energy corporation. The current application is the result of a comprehensive process of contract renegotiation between Distrigas and Sonatrach concerning the 1976 agreement. The two companies have also agreed to a settlement of take-or-pay disputes arising from the 1976 agreement and a long-term restructuring of that agreement, which are not being considered in this proceeding.2/

Distrigas and Sonatrach reached an agreement on January 28, 1988, to amend the 1976 agreement to allow for the sale by Sonatrach to Distrigas of up to five cargoes of LNG during the period January 1, 1988, to May 15, 1988. Under the proposed import arrangement, the LNG sales price would be $2.50 per MMBtu for the first three cargoes and $2.00 per MMBtu for the next two cargoes, plus, in each case, bunkers and port charges. (Under the currently authorized terms of the 1976 agreement, the price of the LNG would be approximately $3.37 per MMBtu.) There is a one-time cooling fee of $3,500 per LNG tanker utilized, for up to two ships. The proposed arrangement also calls for Sonatrach and Distrigas to attempt to agree, prior to February 15, 1988, on a best-efforts basis, upon terms for the sale and purchase of up to three further cargoes of LNG to be delivered before May 15, 1988. In addition, to the extent that any of the five LNG cargoes may be scheduled for delivery after May 15, 1988, Sonatrach and Distrigas will meet to decide upon a

competitive price for such cargoes. None of the LNG shipments contemplated in the proposed arrangement are subject to the take-or-pay provisions of the 1976 agreement. Because the proposed arrangement contemplates imports of LNG during the 1988 winter shipment period, Distrigas requested that the ERA expedite the processing of the application and issue an order by February 12, 1988.

II. Procedural History

A. Interventions

The ERA issued a notice of the application on February 5, 1988, inviting protests, motions to intervene, or comments to be filed by February 24, 1988.3/ The notice granted Distrigas' request for expedited procedures for shortening the comment period and scheduled a conference on the application to be held in Boston, Massachusetts, on February 19, 1988.

To further expedite matters the ERA granted intervenor status to all the parties in the earlier Distrigas dockets, ERA Docket Nos. 77-011-LNG and 82-13-LNG. Those parties are Boston Gas Company (Boston Gas), The Brooklyn Union Gas Company (Brooklyn Union), Connecticut Light and Power (CL&P), Bay State Gas Company, Berkshire Gas Company, Algonquin Gas Transmission Company, New Jersey Natural Gas Company, Providence Gas Company (Providence), South Jersey Gas Company, Valley Gas Company (Valley), Fall River Gas Company, Essex County Gas Company, and the Massachusetts Energy Facilities Siting Council. Motions to intervene in support of, or without comment on, the application were received from Bio Development Corporation, Consolidated Edison Company of New York, Inc., Southern Energy Corporation, and Statoil North America, Inc. A non-intervening letter in support of the application was received from ANR Venture Management Company. This order grants intervention to all movants.

B. Boston Conference

On February 19, 1988, the ERA held a public conference in Boston, Massachusetts, on Distrigas' application.4/ Appearing at the conference were representatives of Distrigas; representatives of the local distribution companies (LDCs) who are the existing customers of Distrigas of Massachusetts Corporation (DOMAC), Distrigas' LNG distributor affiliate (hereinafter referred to as Customers); a potential new DOMAC customer, Boston Edison Company; and Sharon Pollard, the Massachusetts Secretary of Energy Resources. The LDCs expressed concerns about Distrigas' application which were reiterated in subsequent written filings.

C. Written Filings

In response to the application, and to issues raised at the Boston conference, all of the customers filed comments either protesting or requesting the ERA to impose conditions on the authorization, or both. Brooklyn Union, Boston Gas, and CL&P each filed separate comments. The remainder of the Customers filed comments jointly, with Providence and Valley filing additional supplemental comments. Distrigas filed comments in support of the application.

III. Comments Received

A. Positions of Customers5/

The Customers, either severally or as a group, raise six major issues regarding the proposed amendment. The first is that the 1976 agreement, and therefore the ERA import authorization that was predicated on that agreement, was terminated by Distrigas on September 30, 1985, when Distrigas issued a letter to Sonatrach declaring the agreement frustrated as a matter of law and terminated. The contention of the Customers is that, since the 1976 agreement was terminated by Distrigas, it cannot be amended, and that the Distrigas/Sonatrach agreement which is the subject of this application is a new and separate arrangement.

The Customers' second and third contentions are substantially related to their first. The Customers allege that, if the proposed import arrangement is authorized as an amendment to the 1976 agreement, rather than as a separate, stand-alone authorization, the Customers will be exposed to additional take-or-pay liability if DOMAC is successful in obtaining a waiver of Federal Energy Regulatory Commission (FERC) Order 380,6/ a matter currently pending before the U.S. Court of Appeals for the District of Columbia.

The Customers' third concern pertains to the applicability of FERC Opinion No. 291 7/ to volumes imported under the proposed amendment. Opinion No. 291 imposes a limitation on DOMAC's demand charge, as follows: if deliveries fall below 50 percent of contract quantities in two consecutive contract years (April 1 through March 31) the minimum bill will be suspended. DOMAC's demand charge has been suspended pursuant to Opinion No. 291 since April 1, 1987. The Customers fear that the importation of the five cargoes of LNG will contribute to DOMAC's ability to tender the minimum amount required by Opinion No. 291 and, therefore, "trigger" or allow DOMAC to reinstate its demand charge. Also, the Customers are concerned that the proposed amendment's definition of the term "1988 Winter Shipment Period" as meaning January 1, 1988, to May 15, 1988, and the fact that the Sonatrach to Distrigas delivery point will be at Arzew, Algeria, rather than Everett, Massachusetts, as

provided in the 1976 agreement, will allow DOMAC to prolong the contract year and/or take more shipments during the contract year, and therefore reinstitute its demand charge sooner than currently would be allowed.

Fourth, as discussed extensively at the Boston conference, the Customers allege that there may be additional, or hidden, costs associated with the proposed import arrangement that were not detailed in the application, and that the Customers will at some point be expected to pay those costs.

Fifth, the Customers contend that the blanket import authorization granted to Distrigas' affiliate, Cabot Energy Supply Corporation (CESCO), is a suitable and preferable vehicle for importing the five cargoes of LNG and, therefore, the requested authorization is not necessary.

Finally, Brooklyn Union, CL & P, and Valley, contend that the LNG will not be competitively priced at their city-gates, and, as a result, they will probably not purchase any of the LNG. They state, however, that they have no objections to ERA granting the authorization if Distrigas is willing to accept all the risks associated with the importation and if they are assured of not incurring any costs associated with the proposed import arrangement.

In addition to the issues discussed above, which were raised by all or most of the Customers in their written filings, CL & P made three further arguments: (1) that the proposed contractual changes are too substantial to be treated as an amendment to the 1976 Agreement; 8/ (2) that insufficient information is supplied regarding the Distrigas/Sonatrach long-term renegotiation and take-or-pay settlement; 9/ and (3) that there is no explanation of the derivation of the prices to be paid for the five cargoes of LNG.10/

The Customers requested, if the application was not rejected, the following: (1) that the ERA not approve the application as an amendment to the 1976 Agreement but rather treat it as a separate, new arrangement, and that the authorization should be without prejudice regarding the continuing existence of the authorization granted in ERA Docket No. 77-011-LNG; (2) that any authorization be conditioned to require Distrigas to assume all risks associated with the importation; and (3) that the five cargoes of LNG not be allowed to count as quantities tendered to the Customers for purposes of reinstating DOMAC's demand charge.

B. Comments of Distrigas

Distrigas submitted comments on issues raised in the course of the

proceedings, particularly at the Boston conference. Regarding the issue of the existence of the 1976 Agreement, and the related concern that the proposed amendment will "trigger" the Opinion No. 291 demand charge, Distrigas stated that the ". . . customers believe that they will be aided at FERC if ERA proclaims that Amendment No. 2 is something other than what it is, i.e., an amendment to the 1976 agreement." 11/ Distrigas further states that the Opinion No. 291 ". . . matter concerns the proper allocation of jurisdictional costs . . . under FERC-issued certificates. . . ." and should, therefore, be decided by the FERC, not the ERA.12/ Also, Distrigas states that it does not believe, as a practical matter, that enough LNG could be delivered pursuant to the amendment prior to the end of the 1987 contract year on March 31, 1988, to "trigger" DOMAC's demand charge. In addition, Distrigas claims that neither the definition of the "1988 Winter Shipment Period" nor the change in the delivery point of the LNG from Massachusetts to Algeria are intended to, nor can they, change the conditions of DOMAC's FERC tariff.13/

Regarding the Customers fears that there are hidden costs associated with the Amendment No. 2 import arrangement, Distrigas states for the record, in both its written filings and at the Boston conference, that it ". . . will seek to recover LNG costs only from those customers actually purchasing the LNG that is the subject of Amendment No. 2. . . ." 14/

Finally, Distrigas' response to the Customers' contention that the authorization is not necessary because CESCO's existing blanket import authorization could be used, is that ". . . Amendment No. 2 must be judged on its own merits (emphasis Distrigas) and not on the basis (of) . . . some different, hypothetical agreement that was not negotiated." 15/

IV. Decision

Distrigas' application has been reviewed to determine if it conforms with Section 3 of the NGA. Under Section 3, an import is to be authorized unless there has been a finding that the import "will not be consistent with the public interest." 16/ In making this finding, the ERA Administrator is guided by the DOE's natural gas import policy guidelines.17/ Under these guidelines, the competitiveness of the import arrangement in the markets served is the primary consideration for meeting the public interest test.

The ERA has determined that the proposed import arrangement is consistent with the DOE policy guidelines so long as the costs associated with the amendment are borne only by those customers who actually negotiate and purchase the LNG from Distrigas. Negotiated purchases will ensure that the LNG will be sold at competitive prices and will be imported only to the extent

there is a need for the LNG. The availability of the proposed imports will serve the public interest since they can provide a market-responsive source of LNG to the Northeast for use during the winter peaking season. The fact that there are no take-or-pay requirements will ensure that only LNG that can be competitively marketed will be imported pursuant to this authorization.

In making its determination, the ERA has been mindful of the concerns expressed by the Customers. These concerns center on whether the price negotiated between Distrigas and the purchasers of the proposed imports will recover all of the actual costs associated with the imports or whether there will be "hidden" costs to be borne by the Customers, whether or not they purchase any of the LNG. These "hidden" costs would be liabilities of the Customers that would not arise but for the importation of LNG pursuant to the proposed import arrangement, and that would arise regardless of whether the Customers actually take any of the LNG.

Although the Customers' concerns are legitimate, the ERA does not believe that this expedited proceeding on a short-term import arrangement is the appropriate forum to consider and resolve the complicated issues of law and fact that give rise to these concerns. The resolution of these issues, however, is not necessary for approval of the proposed import arrangement. Distrigas has stated, in effect, that there will be no "hidden" costs and that it ". . .will seek to recover LNG costs only from those customers actually purchasing the LNG. . . ." 18/ The ERA believes the Customers should have no reason to fear that the proposed import arrangement will adversely affect them so long as the authorization, in effect, codifies the assurances of Distrigas. Accordingly, the authorization will contain a condition that puts Distrigas at risk to recover the costs associated with imports under the authorization solely through negotiated arrangements with the purchasers of these imports. This provision is intended to ensure that the Customers incur no liabilities that could not have arisen in the absence of the authorization. Of course, if any of the Customers decide to purchase LNG imported pursuant to this authorization they will be liable to the extent that they and DOMAC agree.

The customers also expressed concern over the effect of Distrigas' seeking approval of the proposed import arrangement as an amendment to its 1977 authorization and requested that it instead be treated as a separate authorization. The ERA views the issue of whether this application should be treated as an amendment or as a new import authorization as purely a procedural matter which cannot alter any existing relationship between the Customers and DOMAC. Accordingly, the ERA will approve the proposed import arrangement as an amendment to the 1977 authorization, because that is how it was filed, but wishes to make clear that its action is not intended to have

any prejudicial effect on the status of issues arising from any relationships between Distrigas, and/or DOMAC, and the Customers.

Since Distrigas indicated at the Boston conference that no terms have been agreed upon by Distrigas and Sonatrading Amsterdam B.V., the seller of the LNG under the proposed import arrangement, for the sale and purchase of three further cargoes of LNG prior to the stipulated date for reaching such an agreement, February 15, 1988,19/ no shipment of those additional three cargoes is authorized. Furthermore, Distrigas cannot import LNG after May 15, 1988, without seeking and receiving prior approval from the ERA.

After taking into consideration all the information in the record of this proceeding, I find that granting Distrigas authority to import up to five cargoes of LNG pursuant to the terms and conditions of the proposed import arrangement as set forth in its application is not inconsistent with the public interest.20/

Order

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

A. The authorization granted Distrigas Corporation (Distrigas) by the Economic Regulatory Administration (ERA) in ERA Docket No. 77-011-LNG, issued December 31, 1977 (1977 authorization), is hereby amended to allow Distrigas to import up to five cargoes of liquefied natural gas (LNG) pursuant to the terms of the contract amendment submitted by Distrigas as part of its application in this docket.

B. Such cargoes are to be imported between the effective date of this order and May 15, 1988. Distrigas must seek and receive prior approval from the ERA before it can import any LNG pursuant to Ordering Paragraph A above after May 15, 1988.

C. With respect to the imports authorized by this order, Distrigas shall file within 10 days following the delivery of any cargoes of LNG to Everett, Massachusetts, a report indicating the total volume of the import in MMcf and the purchase and sales price per MMBtu. The report shall also provide the details of each resale transaction, including identification of customers purchasing LNG imported pursuant to Ordering Paragraph A above, Distrigas of Massachusetts Corporation's (DOMAC) sales price and volumes sold to each customer and, if applicable, the per unit (MMBtu) demand/commodity charge breakdown of the price, any special contract price adjustment clauses, and any

take-or-pay or make-up provisions.

D. The import arrangement authorized in Ordering Paragraph A above is not intended to have any prejudicial effect on the status of those issues involving relationships between DOMAC and its customers and arising from the 1977 authorization. Distrigas Corporation and/or DOMAC shall be at risk to recover any costs associated with LNG imported under Ordering Paragraph A above only from those customers actually purchasing the LNG.

E. The motions to intervene, as set forth in this Opinion and Order, are hereby granted, provided that participation of the intervenors shall be limited to matters specifically set forth in their motions to intervene and not herein specifically denied, and that admission of such intervenors shall not be construed as recognition that they might be aggrieved because of any order issued in these proceedings.

Issued in Washington, D.C., on March 4, 1988.

--Footnotes--

1/ Unnumbered and unpublished Order.

2/ In a letter addressed to the Deputy Administrator on February 24, 1988, Distrigas advised the ERA that " . . . Sonatrach and Distrigas agreed to a resolution of all disputes regarding the 1976 Agreement and to an amended term of the agreement. . . ." However, the ERA has not yet received any application regarding that settlement and renegotiation.

3/ 53 FR 3912, February 10, 1988.

4/ See Transcript of February 19, 1988, Conference, ERA Docket No. 88-05-LNG.

5/ Since most of the issues discussed in this section were raised by two or more of the Customers, at the Boston conference or in their written filings, they will be discussed generically without specific footnotes. If a particular document is quoted or referred to it will be individually cited.

6/ Order No. 380, 27 FERC Para. 61,318 (1984), eliminated gas costs from minimum commodity bills.

7/ 41 FERC Para. 61,205 (1987).

8/ Comments, Motion for Ruling that Application to Amend Import Authority is Incomplete and Deficient and Protests that the Application is Unnecessary Due to 1985 CESCO Authorization (February 24, 1988), at 5, 6, and 7.

9/ Id., at 8.

10/ Id., at 5.

11/ Comments of Distrigas Corporation In Support of Application (February 24, 1988), at 11.

12/ Id., at 12.

13/ Id., at 6, 7.

14/ Id., at attachment 1.

15/ Id., at 3.

16/ 15 U.S.C. Sec. 717(b).

17/ 49 FR 6684, February 22, 1984.

18/ See supra note 14.

19/ See supra note 3, at 18.

20/ Because the proposed importation of LNG will use existing facilities, the DOE has determined that granting this application is clearly not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act (42 U.S.C. 4321, et seq.) and therefore an environmental impact statement or environmental assessment is not required.