

Cited as "1 FE Para. 70,243"

Ocean State Power and Ocean State Power II (FE Docket No. 89-27-NG),
September 22, 1989.

DOE/ERA Opinion and Order No. 335

Order Granting Ocean State Power II Authorization to Import Natural Gas
from Canada and Granting Intervention

I. Background

On November 19, 1986, Ocean State Power (Ocean State) filed an application with the Economic Regulatory Administration (ERA) 1/ of the Department of Energy (DOE), pursuant to section 3 of the Natural Gas Act (NGA), for authorization to import up to 100,000 Mcf per day of Canadian natural gas From ProGas Limited (ProGas) over a 20-year term beginning on the date of the first delivery. The imported gas would fuel Ocean State's new power plant which it plans to build in Burrillville, Rhode Island. The plant will be comprised of two 250-megawatt combined cycle electrical generating units to be constructed sequentially.2/

Ocean State entered into a precedent agreement with ProGas on April 17, 1986, which was amended March 3, 1988, to purchase up to 50,000 Mcf of gas per day during periods when only one of the combined cycle units is operational and up to 100,000 Mcf per day during periods when both units are operational.

On June 13, 1988, the ERA issued DOE/ERA Opinion and Order No. 243 (Order 243) 3/ in ERA Docket 86-62-NG, conditionally authorizing Ocean State Power (Ocean State) to import up to 100,000 Mcf per day of Canadian natural gas over a 20-year period, beginning on the date of first delivery, to fuel the new power plant. The ERA found that Ocean State had freely negotiated a gas purchase agreement with terms that provide flexibility to the import arrangement and help ensure that it will be market responsive. Price renegotiation provisions and an arbitration clause are designed to ensure that the imported gas will be competitive in Ocean State's market throughout the term of the import proposal. The ERA found the arrangement to be competitive.

The ERA also found that there is a need for the proposed import and that ProGas has been historically reliable as a supplier of Canadian gas to the United States for many years. No party argued that ProGas reserves are not secure. The ERA found that the security of supply was established and that the import would not lead to any undue dependence on an unreliable source of supply, nor compromise the energy security of the nation over the contract period subsequently adopted by the DOE. ERA conditioned the order on completion of DOE's review of the environmental analyses prepared by the

Federal Energy Regulatory Commission (FERC) and on completion of DOE's National Environmental Policy Act (NEPA) responsibilities.

On September 14, 1988, after DOE's completion of its NEPA review, the ERA issued DOE/ERA Opinion and Order No. 243-A (Order 243-A) 4/ in ERA Docket No. 86-62-NG, authorizing Ocean State to import from ProGas up to 100,000 Mcf per day of gas over a period of 20 years plus 180 days, beginning on the date of the first delivery, in accordance with the pricing and other provisions established in the proposed gas purchase contract submitted as part of its application.

On April 21, 1989, Ocean State and Ocean State II (Ocean State II) filed a joint application with the Office of Fossil Energy (FE) of the DOE to amend Order 243-A. The application was filed under section 3 of the Natural Gas Act and DOE Delegation Order Nos. 0204-111 and 0204-127.

According to the joint application, at the time Order 243-A was issued, Ocean State planned to construct, own, and operate both combined-cycle units. Ocean State currently plans to develop only the first unit, Unit 1, which will utilize 50,000 Mcf of gas per day. To facilitate financing of the project, Ocean State II was formed to develop the second unit, Unit 2. Ocean State II is a separate Rhode Island partnership comprised of companies that are affiliates of the partners in Ocean State. In view of the changed circumstances, Ocean State now requests that its existing authorization be amended to reduce its import authority by one-half to 50,000 Mcf per day. Concurrently, Ocean State II requests authorization to import from Canada 50,000 Mcf per day in place of Ocean State -- 25,000 Mcf per day of the volumes that ProGas originally committed to supply to Ocean State and 25,000 Mcf per day from TransCanada PipeLines Limited (TransCanada)--as fuel for Unit 2.

In light of the fact that there are now two separate corporate entities, each responsible for only one of the two proposed power plants, the DOE has decided to issue separate orders to Ocean State and to Ocean State II. This order addresses only Ocean State II.

Ocean State II filed the following documents with its application: (1) a gas purchase contract appended to the precedent agreement between Ocean State II and ProGas dated July 14, 1988; (2) a gas purchase contract appended to the precedent agreement between Ocean State II and TransCanada and Western Gas Marketing Limited dated August 19, 1988; (3) a letter agreement between Ocean State II and ProGas dated July 14, 1988; and (4) a backstopping agreement appended to the precedent agreement between Ocean State, Ocean State II, ProGas, and TransCanada dated August 31, 1988.

Each of the two precedent agreements that Ocean State II has entered

into with ProGas and TransCanada for Unit 2 provides for a daily contract quantity of 25,000 Mcf per day of natural gas. Deliveries are to commence on the first day of the test phase of Unit 2 for a contract term of 20 years. Ocean State II asserts that in all other respects relevant to the import authorization, the substantive terms of these contracts remain the same as those of the Ocean State/ProGas contract described in the 1986 application.

The price of the gas will be indexed to the New England Power Pool (NEPOOL) Fossil Fuel Index to ensure that the price remains competitive over the life of the contract. The price will be adjusted based on changes in the index. Ocean State II will pay a two-part demand/commodity rate. The purchase contract does not impose a take-or-pay obligation on Ocean State II; thus, Ocean State II will not be required to pay commodity charges for gas not taken. After the tenth contract year, Ocean State II or ProGas or TransCanada may request renegotiation of all the pricing terms of the contract, including both the demand and commodity charge. If either Ocean State II or ProGas or TransCanada is unable to agree upon such pricing terms, either party has the right to refer the matter to arbitration.

The two contracts relating to the Ocean State II project gas supply are identical in almost all respects, the primary exception being the security of supply provisions. The Ocean State II/ProGas contract stipulates that ProGas will provide to Ocean State II every other year an independent consultant's report analyzing ProGas' gas supplies in relation to its gas sales obligations. It also stipulates that, if such report indicates deficiencies, Ocean State II will have the opportunity to secure substitute supplies. The security of supply provisions in the Ocean State II/TransCanada contract are slightly different. TransCanada is required to provide every year to Ocean State II a notice of proven recoverable reserves to annual levels of production. If that ratio is less than ten and TransCanada fails to contract for new reserves, Ocean State II has the right to arrange for alternate supplies.

Ocean State II and ProGas have entered into a letter agreement that sets forth the terms and conditions under which Ocean State II may substitute third-party gas supplies for ProGas volumes pursuant to section 9 of Article II of the Ocean State II/ProGas contract. Ocean State II and TransCanada have entered into a similar agreement for third-party substitution rights.

In addition, Ocean State II, ProGas and TransCanada entered into a precedent agreement in the form of a backstopping agreement pursuant to which ProGas and TransCanada will each backstop the gas supply obligations of the other to Ocean State II on a best-efforts basis.

Based on this application, the only changes in the import arrangement previously authorized in Order 243-A are the substitution of Ocean State II

for Ocean State as the authorized importer of up to 50,000 Mcf per day or one-half of the Canadian gas authorized for import by Ocean State, the substitution of TransCanada as the supplier for one-quarter of the total volumes, the possibility of Ocean State II arranging for purchases of gas from third-party suppliers if ProGas or TransCanada are unable to meet their sales obligations, and the backstop agreement.

A notice of the application was issued on June 9, 1989, inviting protests, motions to intervene, notices of intervention, and comments to be filed by July 26, 1989.^{5/} A motion to intervene without comment was filed by ProGas urging FE to act expeditiously to authorize the requested import. This order grants intervention to this movant.

II. Decision

In Order 243, the ERA found that the import arrangement conforms to the DOE policy guidelines. This new import arrangement will also be competitive because the purchase contracts contain the same automatic price adjustment mechanisms, price renegotiation provisions, and no take-or-pay requirements. Since Ocean State II would incur no take-or-pay or minimum bill obligation in connection with this import, it is reasonable to assume that Ocean State II would not take gas from either supplier if it is not the most competitively priced supply available. Under the policy guidelines, need is presumed to be a function of competitiveness. Based on the marketability of gas under this arrangement, the ERA therefore also determines that the same need exists for this proposed import as for Order 243. With respect to security of supply, the ERA finds that the import will not lead to any undue dependence on an unreliable source of supply, nor otherwise compromise the energy security of the nation over the 20-year term of the import proposal. In fact, splitting the import between two suppliers and the backstop provisions will, if anything, enhance the security of the supply. Therefore, the ERA finds that this proposed import will be consistent with the public interest.

In sum, after review of the entire record of this proceeding, we conclude that there is no information that would provide a basis for us to alter our position in Order 243-A that the proposed import meets the public interest requirements of section 3 of the NGA.

However, in order to ensure that the DOE meets its section 3 responsibilities, in the event that ProGas or TransCanada are unable to meet their sales obligations and Ocean State II arranges for purchases of gas from third-party suppliers, the DOE will require Ocean State II to file a separate application for import authority for any sale and purchase of imported gas involving a substitute supplier for ProGas or TransCanada that is for over two years. For such supplies that are for a term of less than two years, Ocean State II is essentially asking for authority that is identical to the

authority which DOE routinely grants under its blanket import program. These blanket authorizations are limited to a term of two years and DOE will grant Ocean State II authority to import from other foreign suppliers, without separate authorization, for up to two years. Ocean State II may request renewal of this authority.

After taking into consideration all of the information in the record of this proceeding, I find that granting the request in the joint application of Ocean State and Ocean State II to grant Ocean State II authority to import up to 50,000 Mcf per day of natural gas for a term of 20 years--25,000 Mcf per day from ProGas and 25,000 Mcf per day from TransCanada--is not inconsistent with the public interest.

ORDER

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

A. Ocean State Power II (Ocean State II) is authorized to import up to 25,000 Mcf per day of Canadian natural gas from ProGas Limited (ProGas) over a 20-year period beginning on the date of first delivery in accordance with the pricing and other provisions established in the gas purchase contract between Ocean State II and ProGas dated July 14, 1988, submitted with the joint application and described in this order. If ProGas is unable to supply the import volumes pursuant to its contract, Ocean State II is authorized to import natural gas from TransCanada pursuant to the backstopping agreement appended to the precedent agreement between Ocean State, Ocean State II, ProGas, and TransCanada dated August 31, 1988, and submitted with the joint application. The total quantity of gas imported pursuant to this paragraph may not exceed 25,000 Mcf per day.

B. Ocean State II is further authorized to import up to 25,000 Mcf per day of Canadian natural gas from TransCanada PipeLines Limited (TransCanada) over a 20-year period beginning on the date of first delivery in accordance with the provisions of the gas purchase contract appended to the precedent agreement between Ocean State II, TransCanada, and Western Gas Marketing Limited (Western Gas) dated August 19, 1988, submitted with the joint application and described in this order. If TransCanada is unable to supply the imported volumes pursuant to its contractual obligations, Ocean State II is authorized to import the natural gas from ProGas pursuant to the backstopping agreement appended to the precedent agreement between Ocean State, Ocean State II, ProGas, and TransCanada dated August 23, 1988. The total quantity of gas imported pursuant to this paragraph may not exceed 25,000 Mcf per day.

C. Ocean State II is authorized to import an aggregate of 50,000 Mcf per

day of Canadian natural gas on a spot basis from suppliers other than ProGas or TransCanada over a term of two years beginning on the date of first delivery. These volumes when added to the volumes of gas imported from ProGas and TransCanada may not exceed 50,000 Mcf per day on any given day.

D. Ocean State II must submit a separate application for import authority for any imported gas purchased from a substitute supplier for ProGas or TransCanada for a term of over two years.

E. Within two weeks after deliveries begin, Ocean State II shall notify the Office of Fuels Programs, Fossil Energy, Room 3F-056, FE-50, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585, in writing of the date that the first delivery of natural gas authorized in Ordering Paragraphs A, B, and C, above occurred.

F. With respect to the volumes authorized by Ordering Paragraphs A and B above, Ocean State II shall file with the Office of Fuels Programs, Fossil Energy, within 30 days following each calendar quarter, quarterly reports showing, by month, the quantities of natural gas in MMcf imported under this authorization, and the average price per MMBtu paid for those volumes at the international border. The price shall include a demand/commodity charge breakdown on a monthly and per unit (MMBtu) basis.

G. With respect to the imports authorized in Paragraph C above, Ocean State II shall file with the Office of Fuels Programs, within 30 days following each calendar quarter, quarterly reports showing by month, the total volume of natural gas imports in Mcf and the average purchase price per MMBtu at the international border. The reports shall also provide the details of each transaction, including the names of the seller(s) and purchaser(s), including those other than Ocean State II, estimated or actual duration of the agreement(s), transporters, points of entry, markets served, and if applicable, the demand/commodity charge breakdown of the price, and special contract price adjustment clauses, and any take-or-pay or make-up provisions.

H. The motion to intervene as set forth in this Opinion and Order, is hereby granted, provided that participation of the intervenor shall be limited to matters specifically set forth in the motion to intervene and not herein specifically denied, and that admission of such intervenor shall not be construed as recognition that it might be aggrieved because of any order issued in these proceedings.

Issued in Washington, D.C., on September 22, 1989.

--Footnotes--

1/ On January 6, 1989, the authority to regulate natural gas imports and

exports was transferred from the ERA to the Assistant Secretary for Fossil Energy. DOE Delegation Order No. 0204-127 specifies the transferred function (54 FR 11436, March 20, 1989).

2/ On December 31, 1986, Ocean State also filed an exemption petition with the ERA's Office of Fuels Programs pursuant to the Powerplant and Industrial Fuel Use Act of 1978 (P.L. 95-620) to exempt the powerplant from the statutory requirement that it be capable of using coal or another alternate fuel as a primary energy source instead of natural gas or oil. (Docket No. ERA-C&E-87-22).

3/ 1 ERA Para. 70,778.

4/ 1 ERA Para. 70,810.

5/ 54 FR 26832, June 26, 1989.