

Cited as "1 FE Para. 70,244"

Boundary Gas, Inc. (ERA Docket No. 81-04-NG), October 10, 1989.

DOE/FE Opinion and Order No. 45-C

Final Opinion and Order Granting Authorization to Import Natural Gas from Canada

I. Background

On August 9, 1982, the Economic Regulatory Administration (ERA) 1/ of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 45 (Order 45) 2/ to Boundary Gas, Inc. (Boundary), authorizing the importation of natural gas for service into the northeastern United States.^{3/} The gas was to be purchased from TransCanada PipeLine Limited (TransCanada). Boundary was authorized to import up to 185,000 Mcf of gas per day for a period not to exceed ten years from the date deliveries commenced, or from November 1, 1982, whichever occurred first, plus one year for receipt of make-up gas. Boundary was authorized to import a total volume over the authorization term not to exceed 675.25 Bcf.

Tennessee Gas Pipeline Company (Tennessee), a division of Tenneco Inc., would transport the Boundary gas from the point of import near Niagara Falls, New York, to the systems of Boundary's purchasers. In order to implement the transportation arrangement, Tennessee was required to construct and install certain pipeline, compressors and other related facilities.^{4/} The ERA conditioned Boundary's import authorization on the issuance of a final order after DOE review of the Federal Energy Regulatory Commission's (FERC) environmental analysis of the Boundary project ^{5/} and the completion by DOE of its responsibilities under the National Environmental Policy Act of 1969 (NEPA) ^{6/} in connection with the proposed facilities.

Subsequent to the issuance of Order 45, Boundary reduced the scope of its original import proposal as a result of the Canadian National Energy Boards (NEB) January 27, 1983, omnibus export decision in which TransCanada was authorized to export and sell to Boundary less than half its requested volumes.^{7/} Because of the limitations on pipeline capacity in Canada and the U.S. at the time the natural gas sales were to begin, TransCanada and Boundary agreed to divide the reduced Boundary project into two phases. The first phase, termed Boundary Phase I, involved importing 40,000 Mcf of gas per day commencing November 1, 1984,^{8/} and continuing until facilities were available for Phase II, at which time the full 92,500 Mcf per day authorized by the NEB

would be imported. The FERC conducted an environmental review of the Boundary Phase I project and, on February 2, 1984, authorized the resale of those volumes.^{9/} The ERA, after reviewing the environmental material prepared by FERC, as well as conducting its own environmental analysis, issued DOE/ERA Opinion and Order No. 45-B (Order 45-B) removing the condition imposed in Order No. 45 for the Boundary Phase I volumes only.^{10/} On March 5, 1985, Boundary submitted, in an informational filing, an amended gas purchase contract for the Phase I volumes which eliminated the take-or-pay obligations and provided for competitive, market-responsive prices.

On July 24, 1987, the FERC authorized the resale of natural gas and the construction of associated facilities for Boundary Phase II.^{11/} On December 17, 1987, Boundary filed an informational filing with the ERA giving a brief procedural history of the purchase contract for the Phase II volumes. The informational filing enclosed a copy of an amendment to the purchase agreement between Boundary and TransCanada for the Phase II volumes, informed DOE that the FERC had authorized the resale of the Phase II gas, and indicated that the Phase II commencement date was anticipated to be January 15, 1988, but did not request the ERA to take the necessary action of removing the environmental condition imposed in Order 45. Phase II deliveries started on January 15, 1988.

On October 12, 1988, Boundary filed an application with the ERA seeking to amend the Phase II gas purchase contract. It was while considering this application that the ERA realized that the Phase II authorization was still conditional.^{12/} On March 16, 1989, in response to a request by the DOE, Boundary provided various environmental material concerning the Boundary Phase II project as well as a letter addressing why Boundary began importation of the Phase II volumes when the condition had not been satisfied. The gist of Boundary's explanation was that: 1) the ERA had removed the condition for the Boundary Phase I volumes on the basis of the FERC's environmental analysis shortly after the FERC had issued its Phase I decision, 2) the FERC in authorizing Boundary Phase II had determined that the facilities construction involved did not constitute a major Federal action significantly affecting the quality of the human environment, and, 3) therefore, it would have been appropriate for the ERA to discharge the condition in Order 45 to allow the importation of the Phase II volumes. Further, Boundary asked the DOE, to the extent it deemed it appropriate, to issue an order formally discharging the Order 45 condition as applied to Phase II. Boundary cited the FERC decision in *Kansas Power and Light Company v. Williams Natural Gas Company* ^{13/} as authority to amend retroactively the Boundary Phase II import authorizations to alleviate any potential ambiguity existing under the circumstances.

II. Unauthorized Importation

We find that Boundary's importation of the Phase II volumes without receiving a final order removing the condition imposed in Order No. 45 was unauthorized. Nevertheless, because, as discussed below, we believe that Boundary's unauthorized importation was inadvertent, and that the condition in Order 45 has been satisfied, we will hereby issue a final order allowing the importation of the Phase II volumes and do not intend to take any further action on this matter.

The Phase II import authorization was subject to a condition that was not, as Boundary's March 16, 1989, letter seems to suggest, a formality that was effectively discharged when FERC issued a certificate authorizing the construction and operation of related facilities. Order 45 is unambiguous in regards to the environmental condition it imposed. Ordering Paragraph D states:

"The authorization in Ordering Paragraph A is conditioned upon entry of a final ERA order after review by DOE of the FERC environmental analysis of this project, and the completion by DOE of its NEPA responsibilities."

On page 11 of the text of Order 45 we stated:

"When the FERC has completed its environmental review, we will complete our environmental review based on the FERC's analysis, reconsider this opinion and issue a final order."

When Order 45-B authorizing the Boundary Phase I project was issued, it stated on page 7 that:

"Until such time as the environmental condition is satisfied for Boundary Phase II, the authorization for importation of volumes other than Boundary Phase I will remain conditional."

As this language makes clear, removal of the condition in Order 45 was not self-implementing upon completion of FERC's environmental review. DOE had a responsibility to conduct an independent review and analysis of FERC's environmental findings and to reconsider the Boundary project as a whole in light of that environmental review and analysis before issuing any final order. This is what the DOE did in issuing a final order to import the Boundary Phase I volumes, and that is what the plain and unambiguous language of Orders 45 and 45-B made a condition precedent to final authorization to import Boundary Phase II natural gas.

No matter how one interprets the relationship between the FERC's and

DOE's decisions with respect to the Phase I volumes, there is no administrative shortcut that relieves the DOE of its NEPA responsibilities or allows Boundary to import Phase II volumes without first obtaining final authorization removing the Order 45 condition. Nor does the fact that Boundary, in its December 17, 1987, informational filing, informed the ERA that the FERC had approved the construction of the Phase II facilities relieve Boundary of the responsibility to request removal of the condition or allow it to proceed in contravention to the clear terms of Order 45.

However, although Boundary's importation of Phase II volumes was unauthorized, we believe it was inadvertent and note the nearly five years and many intervening events between the initial, conditional authorization, and FERC's final facilities authorization in July of 1987. Indeed, the DOE itself did not recognize when Boundary filed the December 17, 1987, information filing, indicating FERC approval of Phase II, that Boundary had not received a final import authorization. While it is the responsibility of the applicant to ensure that it has received all necessary authorizations prior to initiating an import or export project, and it is at risk for failure to do so, in this instance there is no evidence in the record that Boundary's failure to seek and receive final import authorization was intentional. These considerations, coupled with the DOE's decision, as discussed below, to authorize the importation of the Phase II volumes, has the practical effect of making any concerns regarding unauthorized importation of those volumes moot.

III. Decision

Under section 3 of the Natural Gas Act (NGA) an arrangement to import natural gas must be approved unless it is found that the import "will not be consistent with the public interest." 14/ The Office of Fossil Energy (FE) is guided in making its determination by the DOE's natural gas import policy guidelines.^{15/} Under this policy, the competitiveness of an import in the markets served is the primary consideration for meeting the public interest test. In addition, NEPA requires the FE to consider the environmental effects of natural gas import arrangements.

The FERC was the lead Federal agency in conducting an examination of the environmental effects of constructing the related facilities for the Boundary Phase II project. The FERC found in its July 24, 1987, order that the Boundary Phase II import project did not constitute a major Federal action significantly affecting the quality of the human environment.^{16/} The FERC based its decision in the Boundary Phase II docket on two Environmental Assessments (EA) it conducted on the proposed pipeline facilities involving new construction that would be used to transport the Boundary Phase II

volumes. The two EA's were the INGS Pipeline Project, Environmental Assessment, Tennessee Gas Pipeline Company (FERC Docket Nos. CP86-251-000 and CP86-251-001, issued July 18, 1986), and Environmental Assessment, National Fuel Gas Supply Corporation (FERC Docket No. CP86-677-001, issued July 24, 1987).

The DOE has reviewed the two EA's prepared by the FERC and has adopted them as DOE/EA-0408 and DOE/EA-0409 in partial satisfaction of its NEPA responsibilities regarding the Boundary Phase II project. Based on its review of the EA's, and its independent evaluation of this import arrangement, the DOE has determined that the Boundary Phase II project would not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the NEPA, and that no environmental impact statement or additional EA is required.^{17/}

In Order 45, the DOE conditionally concluded that Boundary's import arrangement, as structured at that time, was not inconsistent with the public interest based on preliminary findings made with respect to the price of, and the security of supply and need for, the imported natural gas. Order No. 45 conditionally authorized Boundary to import up to 185,000 Mcf per day from TransCanada over a ten-year term ending October 31, 1992, at a price not to exceed \$4.94 per MMBtu.

In Order 45-B, the DOE reaffirmed and made final its preliminary findings and public interest determination with regard to the Phase I volumes. The import arrangement between Boundary and TransCanada for the Phase I volumes was subsequently renegotiated and resulted in contract provisions that were more market-responsive and competitively priced.

As discussed in Section I of this order, on December 17, 1987, Boundary submitted, as an informational filing pursuant to DOE regulations,^{18/} an amendment to the gas purchase contract between Boundary and TransCanada regarding the Phase II volumes. The renegotiated contract features a two-part demand-commodity rate structure, a border price indexed to alternative fuels, renegotiation and arbitration clauses, and the elimination of minimum take obligations. This amendment enhances the flexibility and competitiveness of the import arrangement.

IV. Conclusion

Order 45 conditioned Boundary's authority to import natural gas upon the entry of a final opinion and order after review of the environmental analysis of the new facilities necessary to transport those volumes. Order 45-B removed

this condition with respect to the Boundary Phase I project. After examining the entire record of this proceeding, including the EA's prepared by the FERC, I find that there is no information that would provide a basis to alter the preliminary finding in Order 45 that the Boundary import arrangement, as currently configured, is not inconsistent with the public interest within the meaning of section 3 of the NGA. Accordingly, the condition is hereby removed from the conditional authorization in Order 45 for the Phase II volumes as discussed in this order.

ORDER

For the reasons set forth above, pursuant to section 3 of the Natural Gas Act, it is hereby ordered that the condition set forth in Ordering Paragraph D of DOE/ERA Opinion and Order No. 45, issued August 9, 1982, is removed for the 92,500 Mcf of natural gas per day imported pursuant to the Boundary Phase II project described in this opinion.

Issued in Washington, D.C., on October 10, 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 functions (54 FR 11436, March 20, 1989).

2/ 1 ERA Para. 70,539.

3/ Boundary is a corporation comprising 13 natural gas distribution companies and two interstate pipeline companies.

4/ On April 22, 1981, Tennessee filed with the Federal Energy Regulatory Commission an application for a certificate of public convenience and necessity (FERC Docket No. CP81-296-000) seeking authority to construct the facilities and provide the transportation services required for the Boundary project, as well as for volumes to be imported by Tennessee for its own system supply.

5/ See Ordering Paragraph D of Order 45. The FERC, which under DOE Delegation Order No. 0204-55 (44 FR 56735, October 2, 1979) and now DOE Delegation Order No. 0204-112 (49 FR 6684, February 22, 1984), has authority to approve or disapprove the construction and operation of import facilities and the site at which they would be located, must perform an environmental

review before making its decision.

6/ 42 U.S.C. 4321, et seq.

7/ NEB License GL-83 authorized TransCanada to export and sell to Boundary 92,500 Mcf per day for the period November 1, 1984, through October 31, 1993, and 69,373 Mcf per day from November 1, 1993, through October 31, 1994, for a total volume of 330.07 Bcf.

8/ The Phase I volumes were resold to four of the Boundary purchasers--the Brooklyn Union Gas Company, New Jersey Natural Gas Company, Bay State Gas Company (which subsequently assigned its interests in Boundary to Granite State Gas Transmission, Inc.), and the Connecticut Light Power Company.

9/ 26 FERC Para. 61,114, Boundary Gas Inc., (Phase I), February 2, 1984.

10/ 1 ERA Para. 70,560 (February 8, 1984).

11/ 40 FERC Para. 61,088, Boundary Gas, Inc., July 24, 1987.

12/ Proceedings on Boundary's application to amend its authorization, filed in ERA Docket No. 88-64-NG, were suspended pending completion of DOE's environmental review of the Boundary Phase II project.

13/ 45 FERC Para. 61,272, (November 25, 1988).

14/ 15 U.S.C. Para. 717b.

15/ 49 FR 6684, February 22, 1984.

16/ See supra, note 9.

17/ For a more detailed analysis of DOE's environmental assessment of the Boundary Phase II project see the Finding of No Significant Impact issued by the DOE on September 27, 1989, and filed in this docket.

18/ 10 CFR Para. 590.407.