Cited as "1 FE Para. 70,299"

Texas Eastern Transmission Corporation, Northeast Energy Associates, North Jersey Energy Associates (FE Docket No. 89-26-NG), February 7, 1990

DOE/FE Opinion and Order No. 381

Conditional Order Granting Authorization to Import Natural Gas from Canada and Granting Interventions

I. Background

On April 18, 1989, Texas Eastern Transmission Corporation (Texas Eastern), Northeast Energy Associates, A Limited Partnership (Northeast), and North Jersey Energy Associates, A Limited Partnership (North Jersey), filed a joint application with the Office of Fossil Energy (FE) of the Department of Energy (DOE) under section 3 of the Natural Gas Act (NGA), for authorization to import from ProGas Limited (ProGas) up to a combined average of 101,000 Mcf per day of Canadian natural gas, subject to an annual limitation of 36,865,000 Mcf in a 365-day year and 36,966,000 Mcf in a 366-day year.1/ The term of the imports would run for a period of 15 years beginning on the date initial deliveries commence to each applicant under each separate contract with ProGas. As part of this authority, each applicant is requesting approval of related special marketing agreements with ProGas for periods that coincide with its respective long-term purchase contract. Finally, the application also includes a joint request for blanket import authority permitting Northeast and North Jersey to import up to an additional 50,000 Mcf of Canadian gas per day from ProGas or other suppliers under individually negotiated, short-term arrangements. The requested blanket authority would be for two years beginning on the date of first delivery.

In general, Texas Eastern intends to import gas for system supply. The gas imported by Northeast and North Jersey would be used to fuel two new 300 megawatt (MW) cogeneration facilities that will be located in Bellingham, Massachusetts (Bellingham facility), and Sayreville, New Jersey (Sayreville facility).

Imports would enter the U.S. at the international border near Niagara Falls, Ontario, through an interconnection between the pipeline facilities of TransCanada PipeLines Limited (TransCanada) and a new border facility near and parallel to the existing facilities of Tennessee Gas Pipeline Company (Tennessee). The gas would be transported from Niagara Falls to Marilla, New York, by means of a proposed new 49-mile pipeline loop of Tennessee's Niagara

Spur Line which would be jointly owned by Tennessee, National Fuel Gas Supply (National Fuel) and PennEast Gas Services Company (PennEast). From Marilla, the gas then would be transported by PennEast over existing facilities of the CNG Transmission Company (CNG) system to Ellisburg, Pennsylvania. There the gas would enter a new 40-mile line to Leidy, Pennsylvania, which will be jointly owned by National Fuel and PennEast. At Leidy, volumes intended for Texas Eastern would enter its pipeline system. Gas for Northeast would be delivered into Transcontinental Gas Pipe Line Company's (Transco) Leidy pipeline for delivery to Algonquin Gas Transmission Company (Algonquin) at Centerville, New Jersey, and Algonquin would redeliver the gas to the Bellingham cogeneration facility. Gas for North Jersey would be delivered by Transco to Public Service Electric & Gas Company (PSE&G), which would redeliver the volumes to the Sayreville facility. Some, if not all, of the blanket import purchases from ProGas or other suppliers would enter the U.S. at Niagara Falls, and would be transported through existing and proposed pipeline facilities.

Applications for certificates of public convenience and necessity for construction of proposed new facilities were filed with the Federal Energy Regulatory Commission (FERC) as part of its Northeast settlement proceeding.2/ The applicants anticipate that the FERC will issue decision in that proceeding in time to permit the requested imports to begin by November 1990.

Under the gas sales agreements between Texas Eastern and ProGas, executed originally on November 3, 1986, and most recently amended on September 30, 1988,3/ ProGas would supply Texas Eastern up to 101,000 Mcf of gas per day less the quantities that Northeast and North Jersey have agreed to purchase from ProGas. After deducting Northeast's and North Jersey's contract quantities, Texas Eastern's contract quantity would be approximately 29,000 Mcf of gas per day. During the winter season from November 15 through March 31, Texas Eastern, upon specified notice, would purchase any gas not taken by Northeast and North Jersey under their contracts. Also, in the event that Texas Eastern's transportation service begins prior to the start-up of the cogeneration plants, Texas Eastern would purchase up to 101,000 Mcf per day from ProGas, as pipeline operating conditions permit, until the plants can begin receiving the gas.

Under the Texas Eastern/ProGas sales agreement, Texas Eastern would purchase gas from ProGas under a two-part, demand/commodity charge. ProGas's monthly demand charges to Texas Eastern would consist of the demand charges of TransCanada, NOVA, an Alberta Corporation (NOVA), and ProGas. ProGas' monthly demand charge would be adjusted for changes in the demand charges of NOVA, TransCanada, and in ProGas' fixed costs. The commodity charge for the gas at the international border would be an amount equal to the commodity charge per MMBtu in Texas Eastern's rate schedule CD-1 on file and in effect at the FERC for system supply customers in rate zone D, less an amount equal to the transportation charges for moving the gas from the Niagara Falls delivery point to Texas Eastern's pipeline system. In a May 2, 1989, letter, Texas Eastern indicated that the commodity charge for zone D on April 1, 1989, was $2.4283 per MMBtu. The commodity charge would be adjusted for each change in Texas Eastern's commodity charge for firm sales in rate zone D and for changes in the charges for transporting the gas from Niagara Falls to Texas Eastern's system.

The price of the imported gas may be renegotiated annually, or at anytime when changes in market-responsive prices occur in Texas Eastern's gas purchase contracts for system supply, when Texas Eastern makes a new PGA filing at the FERC, or when other changes in market or regulatory conditions occur that warrant price redetermination. Redetermination(s) must result in a delivered price to Texas Eastern's market that is comparable to competing energy prices. If either Texas Eastern or ProGas is unable to agree upon such pricing terms, either party has the right to refer the matter to arbitration.

Under the Texas Eastern/ProGas sales agreement, Texas Eastern is required to purchase a minimum annual quantity of gas. The minimum annual quantity is based on the daily contract quantity of 101,000 Mcf of gas, less the quantities that Northeast and North Jersey purchase, reduced as necessary to maintain the same ratio of takes to total contract volumes available during the contract year as exists between Texas Eastern's U.S. takes and total contract volumes available under contracts with U.S. suppliers having a primary term of more than three years.

The application also seeks authorization for Texas Eastern to import gas that, if not needed for system supply, would be released to Texas Eastern's and/or ProGas' U.S. marketing affiliates for sale on the spot market pursuant to a special marketing agreement unchanged since its original execution on November 3, 1986. Gas sold under the special marketing agreement over the term of the import arrangement would consist of gas imported by Texas Eastern to meet system supply contract demand that is not taken by firm customers for any reason and is thereby made available for sale at freely negotiated, competitive prices by Texas Eastern's and/or ProGas' marketers. Credit is given in meeting Texas Eastern's minimum annual contract quantity requirement for gas sold under the special marketing agreement at the rate of one cubic foot for each cubic foot sold. Credit is also given against the demand charges that Texas Eastern must pay to ProGas with respect to Texas Eastern's daily contract quantity of gas based on the purchase prices paid to Texas Eastern by

Texas Eastern's and/or ProGas' U.S. marketers for special marketing gas.

The Northeast/ProGas and North Jersey/ProGas sales agreements, both dated May 12, 1988, are identical except for the price adjustment provisions. The contracts each provide for the purchase of up to 35,957 Mcf of gas per day based on a two-part, demand/commodity pricing structure. The monthly demand component would recover the costs of transportation in Canada on the pipeline systems of NOVA and TransCanada, and ProGas' fixed costs, and constitutes the minimum monthly bill Northeast and North Jersey would be required to pay ProGas. The commodity charge would be computed under a formula starting with a base price of January 1, 1990, of $1.9365 per MMBtu. The commodity charge under the Northeast/ProGas contract would be adjusted each January 1 by a factor equal to the weighted percentage change during the preceding year in the rate per kilowatt-hour at which electrical output of the Bellingham facility is sold under certain power purchase agreements between Northeast and five electric utilities. Under the North Jersey/ProGas contract, the base price would be adjusted annually by a factor equal to the percentage change during the preceding year in the cost of natural gas purchased by electric utilities in New Jersey as reported to the FERC and announced by the DOE in a publication entitled "Cost and Quality of Fuel for Electric Utility Plants."

The price of the imported gas may be renegotiated annually. During the first ten contract years, no change in the terms would be effective unless mutually agreed upon. Beginning in the eleventh year, if renegotiation does not produce an acceptable redetermination of price within 60 days, either party has the right to refer the matter to arbitration.

Northeast and North Jersey would each be required to take a minimum quantity of gas annually equal to 75 percent of the maximum annual quantity of gas which ProGas is obligated to deliver. If the minimum volumes are not taken in any year, Northeast and North Jersey must purchase from ProGas in the next year the minimum annual quantity plus the preceding year's deficiency volume. The contracts provide that if they fail to take the required quantity, ProGas may begin in the next contract year to bill Northeast and North Jersey for interest at the Canadian prime rate plus two percent on the average commodity value of the deficiency volumes, until the deficiency volumes are made up. The contract also provides that if minimum volumes are not taken, ProGas may seek a reduction in the daily contract quantity.

According to the terms of their contracts, Northeast and North Jersey may enter into a special marketing agreement with ProGas whereby surplus volumes would be released back to ProGas to be re-marketed. Any volumes sold by ProGas would be credited towards Northeast's and North Jersey's minimum annual purchase volumes. In addition, surplus gas may be offered to Texas Eastern.

The Northeast and North Jersey contracts require as a condition precedent that ProGas periodically demonstrate sufficient reserves and deliverability to meet its existing and anticipated gas sales obligations.

The long-term supplies to be purchased from ProGas will make up about 60 percent of the fuel requirements of the Bellingham and Sayreville cogeneration facilities. An additional 20 percent of those requirements will be met through purchases of domestic supplies, Canadian spot market supplies, or under other contractual arrangements. The final 20 percent of the fuel requirements will come from PSE&G's system supply

On April 26, 1989, and again on August 30, 1989, the applicants filed amendments to the Northeast and North Jersey contracts that affect the determination of when initial deliveries commence to trigger the 15-year import term(s). Initial deliveries now would commence upon the "commercial date" of the two cogeneration facilities, and the definition of "commercial date" has been modified to conform to the definition of the same terms in the power purchase contracts between Northeast and North Jersey and their respective electric utility customers. In addition, the filings provided for informational purposes copies of various form agreements related to the financial assurances among the parties. The August 30 filing also provided notice that the Northeast/Bellingham-ProGas contract has been assigned to the project lender as security for the project loan.

In support of their joint filing, the applicants state that their natural gas supply contracts are the result of arms-length negotiations between the customers and suppliers and they contain pricing provisions that will assure that the gas will be marketable over the life of the contract. They further state that the competitiveness of the pricing provisions alone establishes the presumption that the gas is needed, but that, in any event, the need for the gas by the cogeneration plants and by Texas Eastern for system supply to meet its market requirements is fully supported. This, the applicants maintain, is evidenced by the fact that 90 percent of the anticipated electrical capacity of the Bellingham and Sayreville cogeneration plants has already been contracted for, including the sale of steam to industrial facilities at both the Northeast and North Jersey plants. With respect to Northeast and North Jersey's two-year blanket import request, the application notes that Canadian spot gas would not be imported if more competitive supplies of short-term domestic gas are available.

According to the applicants, on January 10, 1989, the Federal Energy Regulatory Commission (FERC) approved both the Northeast and North Jersey cogeneration plants as "qualifying facilities" under the Public Utility Regulatory Policies Act (PURPA) of 1978. In addition, the applicants filed copies of the required certification with the DOE on July 27, 1987, for coal capability pursuant to the Powerplant and Industrial Fuel Use Act (as amended August 11, 1987).

The applicants further state that ProGas, the supplier, has a proven track record of reliability and has provided ample evidence to Texas Eastern, Northeastern, and North Jersey, as well as Canadian regulatory authorities, that these contracts are backed by substantial reserves. In summary, the applicants contend that the import authority they request is in the public interest and complies with the DOE's policy guidelines on the regulation of imported gas.

II. Interventions and Comments

A notice of this application was issued on June 27, 1989, inviting protests, motions to intervene, notices of intervention, and comments to be filed by August 4, 1989.4/ Motions to intervene and comments in support of the application were received from ProGas and CNG Transmission Corporation. A motion to intervene without substantive comment or request for additional procedures was filed by PSE&G. This order grants intervention to all movants.

III. Decision

Under section 3 of the Natural Gas Act, an application to import natural gas must be approved unless, after opportunity for hearing, it is found that the import "will not be consistent with the public interest." 5/ DOE is guided in making its determination by the DOE's natural gas import policy guidelines.6/ Under these guidelines, the competitiveness of an import in the markets served is the primary consideration for meeting the public interest test. Need for the gas supply and security of supply are also important considerations in the case of long-term arrangements such as these. In addition, DOE is required to consider the environmental effects of natural gas import proposals.

A. Competitiveness of the Imports

The DOE guidelines state that the competitiveness of an import arrangement will be assessed by a consideration of the arrangement taken as a whole. They contemplate that the contract arrangements should be sufficiently flexible to permit pricing and volume adjustments as required by market conditions and availability of competing fuels, including domestic natural gas. The uncontested proposal for importing gas by Texas Eastern, Northeast, and North Jersey, as set forth in the application, is in large part consistent with the DOE policy guidelines.

Texas Eastern's supply agreement with ProGas has been structured to reflect future conditions in its markets so that it will have a source of competitively priced natural gas over the life of the contract. Specifically, the amendments contain an automatic price adjustment provision based on changes in Texas Eastern's comparable domestic firm sales. In the event there are changes in market or regulatory conditions, Texas Eastern may request renegotiation of the price it pays ProGas and, if agreement is not reached, refer the matter to arbitration. Texas Eastern's obligation to purchase a minimum annual quantity is based on the ratio between its comparable U.S. takes and contract quantities, and is credited with sales made under the special marketing agreement. Special marketing sales would also produce credits against the demand charges Texas Eastern must pay ProGas.

Similarly, the Northeast and North Jersey sales agreements with ProGas contain provisions which would appear to assure the competitiveness of the imports throughout the 15-year term. Both contracts call for annual price adjustments to the commodity charge based on the price of competing gas and electricity sold and allow for annual price renegotiation. The contracts contain make-up provisions applicable to take-or-pay requirements and Northeast and North Jersey may also release back to ProGas surplus volumes for re-marketing under special marketing agreements. Those agreements further provide that the special marketing volumes can either be offered to Texas Eastern or, if sold to other parties, credited toward their minimum annual purchase volumes. These flexible provisions of the Northeast and North Jersey contracts help to ensure that the ProGas supplies will remain marketable over the term of the arrangements. On the basis of the record before it at this time, the DOE makes a preliminary finding that the import arrangements proposed by the joint applicants are competitive.

B. Need and Security of Supply

Need for this gas and security of supply are not disputed issues in this proceeding. The competitiveness of the underlying supply arrangements gives rise to a presumption of need. In addition, the gas provided to Texas Eastern under the arrangement is a part of the pipeline's long-term general system supply and is, according to its uncontested assertion, essential to meet customer demand. Need for the imported gas as a primary energy source is apparent in the case of Northeast and North Jersey which have already signed contracts to sell steam and have purchase commitments for 90 percent of the electricity that the cogeneration plants will generate.

The security of the gas supply is assured both by the historic reliability of this source of Canadian natural gas and by the fact that ProGas has contracted to purchase the committed volumes of gas from producers in the Province of Alberta to support its obligations under the arrangements. Accordingly, the DOE preliminarily finds that this import is needed by the applicants, and will not lead to any undue dependence on an unreliable source of supply nor otherwise compromise the energy security of the nation over the term of the proposed import.

C. Special Marketing Agreements

The special marketing agreements, described in Part I and Section A above, should enhance the overall competitiveness of this joint import proposal and provide Northeast and North Jersey, as well as Texas Eastern's system supply customers, with an additional measure of protection if demand declines for any reason. Nevertheless, as in the functionally identical Texas Eastern proposal considered in DOE/ERA Opinion and Order 202 (Order 202)7/, the practical effect of the special marketing agreement(s) is that of a long-term blanket import authorization. Order 202 imposed a two-year limit on that proposal "to guard against unanticipated and unintended consequences from the blanket-type authorization." In this case the DOE similarly is limiting the applicants' authority under their special marketing agreements to two years. The applicants may request extensions of this authority when needed.

D. Environmental Determination

The National Environmental Policy Act of 1969 (NEPA) 8/ requires Federal agencies to give appropriate consideration to the environmental effects of their proposed actions. For this jointly proposed project, the issuance of several major permits and authorizations are required before the project can proceed, including DOE's import authorization under section 3 of the NGA and FERC's authorization under section 7 of the NGA for Tennessee, National Fuel and PennEast to construct and operate facilities to transport the natural gas proposed to fuel the cogeneration facilities. The FERC has the lead in preparing the environmental analysis required to assess the impacts of the new facilities related to this import project.

When the appropriate environmental documentation is completed by the FERC, the DOE will independently review the analysis and take the appropriate action to complete the DOE's NEPA responsibilities. The DOE will then reconsider this conditional order and issue an appropriate final opinion and order. The approval of this import of natural gas is therefore conditioned on completion of an environmental review and DOE's responsibilities under NEPA.

This conditional order's findings are preliminary and indicate to the parties the DOE's determination at this time on all but the environmental issues in this proceeding. All parties are advised that the issues addressed herein regarding the import of natural gas will be reexamined at the time of the DOE's review of the FERC's NEPA analysis. The results of that reexamination will be reflected in the final opinion and order.

E. Conclusion

After taking into consideration all of the information in this proceeding, I find that granting Texas Eastern, Northeast, and North Jersey conditional authority to import up to a combined daily average of 101,000 Mcf of gas from ProGas during a 15-year term from the date initial deliveries commence, and blanket authority for Northeast and North Jersey to import up to 50,000 Mcf of gas from ProGas or other Canadian suppliers for a term of two years, beginning on the date of first delivery, 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. Texas Eastern Transmission Corporation (Texas Eastern), Northeast Energy Associates (Northeast), and North Jersey Energy Associates (North Jersey) are authorized to import, jointly, up to a combined average 101,000 Mcf per day of Canadian natural gas from ProGas Limited (ProGas), subject to an annual limitation of 36,865,000 Mcf in a 365-day year and 36,966,000 Mcf in a 366-day year, over separate 15-year terms, beginning on the date of first delivery for each applicant, in accordance with the amended application, as described in this opinion.

B. Within the authorization granted in Ordering Paragraph A to import up to a combined daily average of 101,000 Mcf of natural gas, Texas Eastern, Northeast, and North Jersey may release imported gas not needed, in accordance with their separate special marketing agreements with ProGas, as described in this opinion, for periods of two years from the date(s) of first delivery.

C. Northeast and North Jersey are further authorized to import up to 50,000 Mcf per day of Canadian natural gas on a short-term, spot basis from ProGas or alternate Canadian suppliers for a term of two years beginning on the date of first delivery.

D. Within two weeks after deliveries of the natural gas authorized in Ordering Paragraphs A and B begin, Texas Eastern, Northeast and North Jersey (jointly) shall notify the Office of Fuels Programs, Fossil Energy, FE-50, Room 3F-056, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C., 20585, in writing of the date of first delivery occurred in either instance.

E. With respect to the imports authorized by this Order, Texas Eastern, Northeast, and North Jersey (jointly) shall file with the Office of Fuels Programs within 30 days following each calendar quarter, quarterly reports indicating for each applicant, for long term imports of natural gas, by month, the total volume of the imports in MMcf and the average purchase price per MMBtu at the international border.

F. Northeast and North Jersey (jointly) shall also provide the Office of Fuels Programs within 30 days following each calendar quarter, quarterly reports indicating whether sales of imported gas authorized in Ordering Paragraphs B and C have been made, and if so, giving by month, the total volume of the imports in Mcf, the purchaser and supplier, estimated or actual duration of the agreement(s), transporter(s), point of entry, and, if applicable, the per unit (MMBtu) demand/commodity charge breakdown of the price, any special contract adjustment clauses, and any take-or-pay or make-up provisions.

G. The authorization in Ordering Paragraphs A, B, and C is conditioned upon entry of a final opinion and order by the Office of Fossil Energy (FE) after review by the Department of Energy (DOE) of the final environmental analyses being prepared by the Federal Energy Regulatory Commission (FERC), and the completion by the DOE of its responsibilities on this project under the National Environmental Policy Act. Resolution of this condition may result in further conditions being imposed in subsequent proceedings in this case. The applicants shall be bound by any opinion and order issued in such subsequent proceedings.

H. 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 February 7, 1990.

--Footnotes--

1/ This portion of the authorization requested by the joint applicants reflects a January 23, 1990, modification to the original April 18 filing.

2/ The FERC issued the applicant authority to construct the approximately 41 miles of pipeline between Ellisbury and Leidy, Pennsylvania on July 27, 1989 (48 FERC Para. 61,121).

3/ The public docket in this proceeding contains additional information regarding the history of the contractual relationship(s) among the participants.

4/ 54 FR 28087, July 5, 1989.

5/ 15 U.S.C. Sec. 717b.

6/ 49 FR 6684, February 22, 1984.

7/ Texas Eastern Transmission Corporation, 1 ERA 70,733 (October 30, 1987), rehearing denied, 1 ERA 70,744 (December 30, 1987), affirmed on appeal, Independent Petroleum Association of America v. ERA, 870 F.2d 168 (5th Cir. 1989).

8/ 42 U.S.C. 4321, et seq.