

Cited as "1 FE Para. 70,428"

Rochester Gas and Electric Corporation (FE Docket No. 90-04-NG), March 19, 1991.

DOE/FE Opinion and Order No. 485

Conditional Order Granting Long-Term Authorization to Export and Import Natural Gas to and from Canada and Granting Interventions

I. Background

On January 22, 1990, Rochester Gas and Electric Company (RG&E) filed an 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 export to Canada at St. Clair, Michigan, up to 185 MMcf per day of natural gas plus some additional volumes required to be supplied by RG&E as fuel gas, and to import from Canada at Grand Island, New York, up to 185 MMcf per day of natural gas over a 15-year term. On June 15, 1990, RG&E filed an amendment to its application increasing the volumes it seeks to export and to import to up to 227.5 MMcf per day without making any significant changes to the other terms of the proposed export and import of natural gas. RG&E expects to purchase the natural gas on the U.S. spot market or under long-term contracts. The gas would be transported to the international border using the existing facilities of ANR Pipeline Company (ANR) and Great Lakes Gas Transmission Company (Great Lakes). The gas would be transported in Canada on TransCanada PipeLines Limited (TransCanada) and Union Gas Limited facilities. After reentry into the U.S. at Grand Island, New York (in the vicinity of Niagara Falls), the gas would be transported to a point of interconnection with the gas distribution facilities of RG&E near Rochester, New York via the proposed Empire State Pipeline. The Empire State Pipeline project involves construction of a 155-mile intrastate pipeline extending from an interconnection with TransCanada at a point under the Niagara River near Grand Island to Syracuse, New York.

RG&E states that the proposed export/import of natural gas would be a means of supplying gas needed for RG&E's system supply and would not result in a net export or net import of gas except for a small amount supplied to TransCanada as fuel gas for transportation of the exported volumes in Canada. The export/import proposal is part of a transportation arrangement to provide additional sources of gas to RG&E who is now dependent upon CNG Transmission Corporation (CNG) for most of its system supply gas requirements and for all of its transportation.

RG&E is a natural gas and electric public utility serving approximately 260,000 natural gas customers in and around Rochester, New York. In support of its application, RG&E states that the natural gas it seeks to export and import, including the additional volumes requested in the amendment to its application, is needed to provide gas for its system supply that is competitive with other fuels and other sources of natural gas.

In response to the notice issued on March 16, 1990,^{1/} with respect to RG&E's original application, Great Lakes filed a motion to intervene without comment. CNG filed a motion to intervene in opposition to RG&E's export/import proposal and requested a trial-type hearing. National Fuel Gas Supply Corporation (National Fuel) filed a motion to intervene and requested additional proceedings if it is determined that the Federal Energy Regulatory

Commission (FERC) does not have jurisdiction over the proposed Empire State Pipeline or over an alternative pipeline arrangement proposed by National Fuel to transport the gas to RG&E.

In response to the amendment of its application filed by RG&E on June 15, 1990, increasing the volumes RG&E proposes to export/import to 227.5 MMcf per day, CNG filed a motion requesting FE to reject RG&E's amendment on the grounds that (1) RG&E did not disclose in the amendment that RG&E's proposed exportation of natural gas to and importation of natural gas from Canada was being considered at the FERC and that (2) RG&E does not have firm transportation arrangements for all of the gas RG&E proposes to export and import. On July 25, 1990, RG&E filed an answer to CNG's motion contending that: (1) RG&E had disclosed in its amendment that its export/import proposal was under consideration at the FERC; and that (2) the regulations applicable to RG&E's export/import application do not restrict FE's authority to review and approve applications to situations in which all of the transportation arrangements have been finalized prior to filing of the application.

A notice of RG&E's amended application was issued on October 9, 1990.² In response to this notice, on November 13, 1990, CNG filed an amended protest in opposition to RG&E's amended application. On November 16, 1990, National Fuel withdrew its opposition to RG&E's export/import proposal and stated that it intended to become a customer of the proposed Empire State Pipeline. On November 28, 1990, a motion to intervene in support of RG&E's application was filed out of time by Empire State Pipeline. Also, on November 28, 1990, RG&E filed an answer to CNG's amended protest. On December 12, 1990, CNG filed a reply to RG&E's answer. This order grants intervention to all movants, including Empire State Pipeline, since its late motion will not cause any delay in the proceeding nor prejudice to any party.

In both the March 22 and October 12, 1990, notices issued by the DOE with respect to RG&E's application, the DOE stated that since, according to the application, the same gas would be exported and imported solely as part of a transportation arrangement, and would not be sold or stored in Canada, the DOE does not believe that it is necessary to consider in its evaluation domestic need for the gas with respect to the export, nor competitiveness, need for the gas, nor security of supply with respect to the proposed import. The DOE also stated in the notices that it will consider the impact of the transportation arrangement on the availability of gas in the markets served by Great Lakes' and ANR's pipeline systems, and by the proposed Empire State Pipeline.

In both its filings in opposition to RG&E's original application and RG&E's amended application, CNG requested a trial-type hearing, or alternatively, an oral presentation with respect to the following questions: (1) would the proposed Empire State Pipeline promote fair competition for gas transportation in the U.S. Northeast gas market; (2) is the proposed transportation arrangement needed to enhance the availability of gas in markets proposed to be served by RG&E, a market already adequately served by CNG and other open-access interstate pipeline suppliers; (3) is the proposed transportation arrangement an uneconomic bypass of CNG's pipeline facilities that would shift substantial costs to other interstate consumers; (4) does RG&E have the long-term gas supply arrangements to support the gas service it proposes to provide in terms of firm gas supply and transportation arrangements; and (5) should FE condition any authorization issued to RG&E upon receipt of all environmental authorizations by the FERC. CNG argues that in evaluating the impact of the transportation arrangement on the availability

of gas in the markets served by the pipeline facilities utilized, DOE must apply section 7 standards relating to public convenience and necessity in carrying out its section 3 responsibilities.

RG&E argues in its answers filed in response to the questions raised by CNG that questions 1, 2 and 3 relate to the construction and operation of pipeline facilities, including ratemaking relating thereto, which are either under the jurisdiction of the FERC or the New York Public Utility Commission in the case of the proposed intrastate Empire State Pipeline. RG&E further argues that question No. 4 relates to security of supply which is not relevant to consideration by FE of an export/import proposal for domestic (U.S.) gas. RG&E notes that, in any event, DOE regulations and policy do not require that all gas supply and transportation arrangements be in place before an export/import arrangement can be approved.

II. Decision

The application filed by RG&E has been evaluated to determine if the proposed export/import transportation arrangement meets the public interest requirements of section 3 of the NGA. Under section 3, an import or export must be authorized unless there is a finding that they "will not be consistent with the public interest." 3/ The NGA therefore establishes a presumption in favor of authorization and the burden is CNG's to persuade DOE that granting the application would not be consistent with the public interest.

A. General Policy Considerations

According to the application, domestic (U.S.) gas would be exported and imported solely as part of a transportation arrangement; no domestic supplies would be sold or stored in Canada and the arrangement does not involve imports of Canada gas for domestic (U.S.) consumption. For this reason, as emphasized in the March 22 and October 12 notices of the RG&E application, the public interest inquiry focuses on the impact of the transportation, i.e., the movement of the gas through the pipeline facilities of Great Lakes, ANR and the proposed Empire State Pipeline on the availability of gas in markets served by those pipeline facilities.

Based on the record before it at this time, DOE/FE preliminarily finds that the RG&E export/import transportation proposal is not inconsistent with the public interest. There is no evidence in the record that the proposed export/import arrangement would have any adverse effect on gas availability in markets served by the pipelines involved in the RG&E project. No customers of any of these pipelines have opposed the project or complained that they would be adversely affected by capacity-related interruption of service or for any other reason. The proposed export/import arrangement should enhance the diversity, availability and reliability of gas supplies to RG&E which is now almost totally dependent on CNG for gas supply and transportation service.

With respect to CNG's protest and request for a trial-type hearing, section 590.313 of DOE's administrative procedures requires any party filing a motion for a trial-type hearing to demonstrate that there are factual issues genuinely in dispute that are relevant and material to the decision and that a trial-type hearing is necessary for a full and true disclosure of the facts. DOE has examined the matters raised by CNG in its protest as amended and has concluded that they do not involve disputed issues of fact, are not relevant to the merits of this proceeding and are outside the scope of this proceeding. Whether the proposed Empire State Pipeline would promote fair competition

among pipelines for gas transportation business, whether RG&E's gas transportation arrangement is needed and consistent with FERC's open-access policies or whether RG&E's gas transportation arrangement is an uneconomic bypass of CNG's facilities are matters which reflect CNG's concern over FERC's policy as it relates to competition among pipelines. As such, they are not factual issues and are not relevant to FE's evaluation of RG&E's export/import proposal which focuses on the impact of the movement of the gas under the proposed transportation arrangement on gas customers, and not the effect on pipelines competing for the gas transportation business. Whether RG&E has firm long-term supply arrangements in place for its export/import proposal relates to security of supply and is not relevant since this proceeding does not involve the importation of foreign-source gas. The fact that transportation of the domestic gas happens to go through Canada to reach U.S. Northeast markets does not make this matter relevant or bring it within the scope of this proceeding. Further, even if foreign-source gas were involved, DOE as a matter of policy has never required that all gas supply and transportation arrangements be in place before a final decision could be rendered on an export or import application.

The last matter raised by CNG, that any authorization issued should be conditioned on receipt of the results of the FERC's review of the environmental impact of RG&E's proposal, involves questions of law and policy, not fact. As stated in section II B of this order, the DOE will reexamine the preliminary findings made in this order after completing the environmental analysis of RG&E's proposal, required by the National Environmental Policy Act of 1969 (NEPA).^{4/} Accordingly, CNG's request for a trial-type hearing is denied.

With respect to CNG's request for an oral presentation, section 590.312 of DOE's administrative procedures provides that an oral presentation may be granted if there is a substantial question of fact, law or policy at issue and that illumination of that question will be aided materially by such oral presentation. Since the questions raised by CNG are not relevant except for environmental considerations and since CNG has not demonstrated that an oral presentation would materially aid in the completion of the environmental evaluation of RG&E's proposal required by NEPA, CNG's request for an oral presentation is also denied.

B. Environmental Determination

NEPA requires Federal agencies to give appropriate consideration to the environmental effects of their proposed actions. RG&E's export/import proposal requires the issuance of several permits and authorizations before the project can proceed, including FE's export/import authorization under section 3 of the NGA and FERC's authorizations related to the proposed Empire State Pipeline.^{5/} The FERC has the lead in preparing the environmental analysis required to assess the impacts of constructing and operating the new pipeline facilities related to this import/export project. DOE is a cooperating agency in the environmental review process.

The approval of this export/import arrangement is therefore being conditioned on completion of the environmental review for the proposed Empire State Pipeline facilities and DOE's responsibilities under NEPA. When this process is completed, FE will then reconsider this conditional order and issue an appropriate final opinion and order.

This conditional order makes preliminary findings and indicates to the

parties the FE's determination at this time on all but the environmental issue in this proceeding. All parties are advised that the issues addressed herein regarding the import/export exchange of natural gas will be reexamined at the time of the DOE's review of the FERC NEPA analysis. The results of that reexamination will be reflected in the final opinion and order.

C. Conclusion

After taking into consideration all of the information in the record of this proceeding, I find that granting RG&E conditional authority to export to Canada up to 227.5 MMcf per day of natural gas plus such additional volumes as may be used for transportation fuel, and to import from Canada up to 227.5 MMcf per day of natural gas over a 15-year period, is not inconsistent with the public interest and should be approved.

ORDER

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

A. Subject to the condition in Ordering Paragraph B, Rochester Gas and Electric Corporation (RG&E) is authorized, commencing on the date of first delivery on the proposed Empire State Pipeline, to export to Canada up to 227.5 MMcf per day of natural gas plus such additional volumes as may be used for transportation fuel, and to import from Canada up to 227.5 MMcf per day of natural gas over a 15-year period, as described in the application and discussed in this Opinion and Order.

B. The authorization in Ordering Paragraph A is conditioned upon entry of a final opinion and order after review by the Department of Energy (DOE) of the environmental documentation being prepared by the Federal Energy Regulatory Commission (FERC) and the completion by the DOE of its National Environmental Policy Act (NEPA) responsibilities.

C. RG&E shall notify the Office of Fuels Programs, Fossil Energy, FE-50, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585, in writing of the date of initial exports and imports of natural gas made under Ordering Paragraph A above within two weeks after deliveries begin.

D. RG&E 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 exports and imports in Mcf.

E. The motions to intervene, as set forth in this Opinion and Order, are hereby granted, provided that participation of the intervenor shall be limited to matters specifically set forth in the motions 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.

F. The authorizations granted in Ordering Paragraph A are subject to the condition stated in Ordering Paragraph B, the resolution of which may result in further conditions being imposed in subsequent proceedings in this case. RG&E and the intervenors in this proceeding shall be bound by any Opinion and Order issued in subsequent proceedings.

Issued in Washington, D.C. March 19, 1991.

--Footnotes--

1/ 55 FR 10662, March 22, 1990.

2/ 55 FR 41597, October 12, 1990.

3/ 15 U.S.C. 717b.

4/ 42 U.S.C. 4321, et seq.

5/ Empire State Pipeline applied to the FERC on December 4, 1989, for authority under section 3 of the NGA (CP90-316-000) and a Presidential Permit (CP90-317-000) to site, construct, and operate its pipeline facilities at the international border to import gas.