

Cited as "1 FE Para. 70,435"

Fulton Cogeneration Associates (FE Docket No. 90-34-NG), March 28, 1991.

DOE/FE Opinion and Order No. 492

Order Granting Conditional and Final Long-Term Authority to Import and Export Natural Gas from and to Canada and Granting Intervention

#### I. Background

On April 27, 1990, Fulton Cogeneration Associates (Fulton) 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 import up to a maximum of 12,500 MMBtu of natural gas per day from Canada, not to exceed a total of 55 Bcf. Fulton proposes to import up to 6,000 MMBtu of gas per day from Star Oil & Gas Ltd. (Star) and up to 6,500 MMBtu of gas per day from OMV (Canada) Ltd. (OMV) under two long-term gas sales contracts.<sup>1/</sup> The gas would be used to fuel a new 47.4 megawatt cogeneration facility to be built in Fulton, New York. The cogeneration facility is expected to be operational November 1, 1991. Fulton also seeks authority, if necessary, to use temporary alternate transportation routes to import the proposed volumes into the U.S., and then export the gas to Canada for reimportation and ultimate delivery to the cogeneration facility.

Fulton is a New York limited partnership with its principal place of business in Fairfax, Virginia. It is comprised of ANR Venture Fulton Company and Coastal Power Production Company, both of which are subsidiaries of The Coastal Corporation of Houston, Texas. Fulton would own and operate the gas-fired cogeneration facility which will be used to produce electricity for sale to Niagara Mohawk Power Corporation (Niagara Mohawk). Steam generated by the facility will be sold to a food plant owned by Nestles Food Corporation.

The gas purchased from OMV in Alberta would be transported within Alberta by NOVA Corporation to Empress, Manitoba. Gas purchased from Star in Saskatchewan would be transported within the province by TransGas Limited to Success. TransCanada PipeLines Limited (TransCanada) would transport the gas from these points to a new international border connection with the proposed Empire State Pipeline (Empire State) near Grand Island, New York. Empire State is a proposed intrastate pipeline that would extend from Grand Island to Syracuse, New York.<sup>2/</sup> Final delivery from Syracuse to the cogeneration facility would be provided by Niagara Mohawk, which has a proposed connection with Empire State.

Transportation on TransCanada to Grand Island would require building a gas pipeline from Blackhorse, Ontario, known as the Blackhorse Extension. However, TransCanada's proposed Blackhorse Extension is part of the company's 1991/1992 facilities application now pending before the National Energy Board of Canada (NEB) and will not be operational before November 1, 1991.<sup>3/</sup> Thus, Fulton described four alternative and interim transportation routes through the Midwest using combinations of five existing interstate pipeline systems and one or both of two additional import points in the U.S. to deliver gas received from TransCanada to Niagara Mohawk for redelivery to Fulton.<sup>4/</sup> Each transportation alternative would involve the same import point interconnection with TransCanada's system near Emerson, Manitoba. Two of the five would also require the gas to reenter Canada near St. Clair, Michigan, at the inlet of TransCanada's system, from where it would be transported to and reimported at

Niagara Falls, New York.5/

#### A. Star Agreement

The natural gas sales agreement between Fulton and Star dated October 23, 1989, calls for Fulton to import a daily contract quantity (DCQ) of up to 6,000 MMBtu of Canadian natural gas during an initial term beginning November 1, 1990, through October 31, 2005. Under the contract title to the gas would pass from Star to Fulton in Saskatchewan. Fulton would bear separately the cost for pipeline transportation by TransCanada from Saskatchewan to Grand Island. The price at which the gas will be sold is initially \$1.90 (U.S.) per MMBtu and during the next ten years, starting November 1, 1991, it would increase by three percent per year. If, at the beginning of any contract year, the sales price per kilowatt hour for electricity sold by Fulton to Niagara Mohawk equals or exceeds \$0.07 (U.S.), the price paid by Fulton to Star for the current year would be the price paid in the previous year, increased by whichever of the following factors is greater: three percent or 80 percent of the change in the final U.S. implicit price deflator for GNP for the twelve months ending September 30th of the previous contract year published by the U.S. Department of Commerce.

Fulton is obligated to purchase a minimum annual quantity (MAQ) from Star equal to 80 percent of the sum of the DCQ volumes in effect on each day of the contract year. If Fulton purchases less than the MAQ it must pay Star an amount equal to the deficiency quantity (DQ) times the weighted average price in effect during the particular contract year. Fulton can make up deficiency volumes in the succeeding three contract years. If Fulton has not fully recovered deficiency payments by the end of the third year, Star must refund the remainder of Fulton's payment.

At least six months before the beginning of the twelfth year of the contract, Fulton and Star will begin negotiations to establish a price for the remainder of the contract term. If agreement on a price or a method for its determination cannot be reached, subject to certain conditions, the contract will terminate at the end of the eleventh year.

#### B. OMV Agreement

The natural gas sales agreement between Fulton and OMV provides for the purchase of up to 6,500 MMBtu of Canadian natural gas per day during an initial term beginning November 1, 1990, through October 31, 2002. Under this contract title to the gas would pass from OMV to Fulton at the border between Alberta and Saskatchewan. Fulton would bear separately the cost for pipeline transportation to Grand Island. According to the application, the base price for the gas is \$1.751 (U.S.) per MMBtu as of November 1, 1990. The contract provides for minimum annual price escalations. The escalations are calculated by multiplying the base price by a fraction, the numerator of which is the weighted average sales price per kilowatt of electricity received from Niagara Mohawk by Fulton during a given contract year and the denominator of which is \$0.06 (U.S.) per kilowatt, if the latter figure is greater than the base price. Additionally, if a figure calculated to be 80 percent of the average market price for gas published by the Province of Alberta is greater than the base price, Fulton is obligated to pay the higher price.

During the first two contract years Fulton is obligated to purchase a MAQ equal to 55 percent of the DCQ less certain exclusions. After the first two contract years the MAQ rises to 80 percent of the DCQ. If Fulton purchases

less than the initial MAQ it must pay OMV an amount equal to the DQ times the price in effect during the year in question. Fulton can make up deficiency volumes in the succeeding three years. OMV retains any deficiency payments on volumes not made up by Fulton in the three-year period.

Two years or less before the end of the sales agreement, Fulton and OMV agree to start negotiations regarding the possible extension of the contract. If the parties are unable to reach an agreement one year before the end of the contract, neither party is required to continue discussions.

## II. Interventions

A notice of this application was issued on July 14, 1990, inviting protests, motions to intervene, notices of intervention, and comments to be filed by August 24, 1990.<sup>6/</sup> A motion to intervene and protest was filed on August 24, 1990, by CNG Transmission Corporation (CNG). On September 10, 1990, Fulton filed a response. This order grants intervention to CNG.

## III. Decision

The application filed by Fulton has been evaluated to determine if the proposed import/export arrangement meets the public interest requirements of section 3 of the NGA. Under section 3, imports and exports must be authorized unless there is a finding that they "will not be consistent with the public interest." <sup>7/</sup> The NGA thus 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

In making its section 3 determination, DOE is guided by its natural gas policy guidelines,<sup>8/</sup> which establish competitiveness as the primary consideration for examining an import.<sup>9/</sup> The guidelines presume an import is competitive if contract arrangements are sufficiently flexible to permit pricing and volume adjustments in response to market conditions. Fulton's import proposal, uncontested in this regard, is consistent with the policy guidelines. Fulton has freely negotiated long-term gas purchase arrangements with two Canadian suppliers under contract terms that provide for market-responsive pricing, limited price renegotiation, and make up of deficiency volumes. The provisions of these contracts are the same whether the gas is imported using the proposed Empire State pipeline or existing facilities under one or more of Fulton's interim, alternative arrangements.

DOE also considers, particularly in long-term arrangements, need for and security of the imported supply. Need is viewed under DOE guidelines as a function of marketability and an imported supply, such as Fulton's, which has been found competitive, is presumed to be needed. With respect to security of supply, Fulton notes the historic reliability of Canadian suppliers and asserts OMV and Star have adequate gas reserves to support their respective sales agreements with Fulton. This issue is uncontested here and DOE finds no information in this record to call into question Canada's reliability as a supplier.

In its protest CNG asserts DOE cannot properly make a determination on Fulton's application until the following have occurred: (1) FERC makes a determination regarding competing applications to serve the market(s) that will be served by the Empire State project; (2) FERC makes a determination

regarding the proposed Empire State project including a National Environmental Policy Act (NEPA) 10/ determination; and (3) DOE conducts an independent NEPA analysis of the proposed Empire State project in its entirety. CNG states it does not oppose the proposed import if authorization is limited to arrangements proposing to use existing pipeline facilities.

DOE has examined the matters raised by CNG's protest, which does not address the policy criteria considered by DOE in making a determination under section 3, and concluded CNG has not overcome the statutory presumption in favor of authorization. As a matter of policy, DOE does not condition import authorizations upon FERC certification of related facilities, and FERC is, as CNG notes, considering various proposals to construct competing pipeline facilities. With respect to CNG's NEPA arguments, as discussed below, DOE will reexamine the preliminary findings made in this order after the environmental analysis of the Empire State project is completed by FERC and DOE has satisfied its independent NEPA responsibilities.

#### B. Environmental Determination

NEPA requires Federal agencies to give appropriate consideration to the environmental effects of their proposed actions. To the extent Fulton's proposed import and export of gas will use existing facilities, DOE has determined that granting this application is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA and therefore an environmental impact statement or environmental assessment is not required.<sup>11/</sup>

Fulton's import proposal, to the extent it involves the proposed Empire State project, requires the issuance of several permits and authorizations before the project can proceed, including, but not limited to, FE's import authorization under section 3 of the NGA, and a FERC Presidential Permit and authorization under section 3. FERC has the lead in preparing the environmental analysis required to assess the impacts of the new facilities related to the Empire State project. DOE is a cooperating agency in the environmental review process.

Approval of Fulton's import arrangement involving transportation on Empire State is therefore being conditioned on completion of the environmental review of the new facilities and DOE's responsibilities under NEPA. When this process is completed, DOE will then reconsider this conditional order and issue an appropriate final opinion and order.

To the extent this order is conditional, it makes preliminary findings and indicates to the parties 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 at Grand Island, will be reexamined at the time of DOE's review of the FERC NEPA analysis of Empire State. 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 Fulton's application is not inconsistent with the public interest within the meaning of the NGA. Accordingly, Fulton is granted final authority to use existing pipeline systems to import up to 12,500 Mcf per day of Canadian natural gas at Emerson, Manitoba beginning on

the date of the first delivery through October 31, 2002, and up 6,000 Mcf per day thereafter through October 31, 2005, not to exceed a total of 55 Bcf. In addition, solely as part of a transportation arrangement, Fulton is authorized to export this gas back to Canada at St. Clair, Michigan and reimport it at Niagara Falls, New York. For the same reason, Fulton is granted conditional authority to import this gas through the proposed Empire State pipeline facilities, subject to DOE's environmental review being completed.

#### ORDER

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

A. Fulton Cogeneration Associates (Fulton) is authorized to import from Canada at Emerson, Manitoba using existing pipeline facilities, up to 12,500 Mcf per day of natural gas from the date of the initial delivery through October 31, 2002, and up 6,000 Mcf per day thereafter through October 31, 2005, not to exceed a total of 55 Bcf. In addition, solely as part of a transportation arrangement, this gas may be exported back to Canada at St. Clair, Michigan and then reimported at Niagara Falls, New York for ultimate delivery to Fulton's cogeneration plant.

B. Fulton is authorized to import the volumes set forth above using the proposed Empire State Pipeline (Empire) facilities conditioned upon the 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 for the Empire project and the completion by the DOE of its National Environmental Policy Act responsibilities.

C. The authorizations granted herein are based on the natural gas sales agreements between Fulton and Star Oil & Gas Ltd. (Star) and Fulton and OMV (Canada) Ltd. (OMV), as described in the application and discussed in this Opinion and Order.

D. Fulton shall notify the Office of Fuels Programs, Fossil Energy, Room 3F056 FE-50, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585, in writing of the date of initial imports and exports of natural gas made under Ordering Paragraph A above within two weeks after deliveries begin.

E. With respect to the natural gas imports and exports made under Ordering Paragraph A, Fulton shall file with the Office of Fuels Programs within 30 days following each calendar quarter, quarterly reports indicating whether sales of imported and/or exported natural gas have been made, and if so, giving, by month, the total volume of the imports and exports in Mcf and the average purchase price per MMBtu at the international border, and indicating whether Fulton received the gas from Star or OMV. The monthly pricing information shall include a demand/commodity charge breakdown on a monthly and per unit (MMBtu) basis.

F. The motion of CNG Transmission Corporation (CNG) to intervene, as set forth in this Opinion and Order, is hereby granted, provided that CNG's participation shall be limited to matters specifically set forth in its motion to intervene and not herein specifically denied, and that the admission of CNG shall not be construed as recognition that it might be aggrieved because of any order issued in these proceedings.

G. The authorization granted in Ordering Paragraph B is subject to the condition stated, the resolution of which may result in further conditions being imposed in subsequent proceedings in this case. Fulton and the intervenor in this proceeding shall be bound by any Opinion and Order issued in subsequent proceedings.

Issued in Washington, D.C., March 28, 1991.

--Footnotes--

1/ One MMBtu equates to approximately one Mcf.

2/ Empire State Pipeline Company has received a construction certificate from the New York Public Service Commission and has pending before the Federal Energy Regulatory Commission (FERC) an application for NGA section 3 authority (Docket No. CP90-316-000) and a Presidential Permit (Docket No. CP90-317-000) to site, construct, operate, and maintain the pipeline facilities at the international border.

3/ NEB Docket No. GH-5-89.

4/ Those interstate pipelines are Viking Gas Corporation, Great Lakes Gas Transmission Company, ANR Pipeline Company, and CNG Transmission Corporation.

5/ The application was confusing about where the gas would be reimported, but it subsequently was clarified after the close of the public comment period in a letter from Fulton dated February 22, 1991.

6/ 55 FR 30267, July 25, 1990.

7/ 15 U.S.C. 717b.

8/ 49 FR 6684, February 22, 1984.

9/ Fulton requests export authority to facilitate alternative transportation proposals; the applicant does not intend to export domestic gas supplies for sale or storage in Canada.

10/ 42 U.S.C. 4321, et seq.

11/ See 40 CFR 1508.4 and 54 FR 12474 (March 27, 1989).