UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

OFFICE OF FOSSIL ENERGY

BROOKLYN UNION GAS COMPANY, et al.	DOE/ERA DOCKET NO. 86-48-NG
COMMONWEALTH GAS COMPANY	DOE/FE DOCKET NO. 91-92-NG

ORDER GRANTING TRANSFER OF LONG-TERM
IMPORT AUTHORIZATION AND GRANTING INTERVENTION

DOE/FE OPINION AND ORDER NO. 561

DECEMBER 19, 1991

I. BACKGROUND

On August 12, 1991, Brooklyn Union Gas Company, et al. (Brooklyn Union), 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) and DOE Delegation Order Nos. 0204-111 and 0204-127, requesting transfer of a long-term authorization to import Canadian natural gas. Brooklyn Union, a group of local distribution companies (the Repurchasers), currently is authorized to import up to 397,100 Mcf per day of Canadian natural gas over a 15-year period. The August 12th application was filed on behalf of Commonwealth Gas Company (Commonwealth) and Boston Gas Company (Boston Gas), and requested the transfer of 4,500 Mcf per day of Boston Gas' current import authority as a Repurchaser to Commonwealth.

The Repurchasers were conditionally authorized to import up to 397,100 Mcf per day of Canadian natural gas pursuant to DOE/FE Opinion and Order No. 368 (Order 368). 1/ The authorizations were conditioned upon completion by DOE of a review of the environmental impacts of the construction and operation of the facilities proposed to import and transport the natural gas. DOE subsequently completed environmental reviews of the proposed facilities and granted final authorizations in DOE/FE Opinion and Order Nos. 368-A (Order 368-A), 2/ 425, 3/ and 368-E. 4/ DOE/FE

1/ 1 FE 70,285 (January 11, 1990).

2/ 1 FE 70,370 (November 15, 1990).

3/ 1 FE 70,353 (September 29, 1990).

4/ 1 FE 70,505 (November 27, 1991).

Opinion and Order No. 368-B (Order 368-B) 5/ denied rehearing of Orders 368 and 368-A, and DOE/FE Opinion and Order Nos. 368-C (Order 368-C) 6/ and 368-D 7/ granted certain technical amendments to Order 368 in conformance with contract changes.

In the current request, Boston Gas seeks to transfer to Commonwealth 4,500 Mcf per day of its pro rata share of the Brooklyn Union volumes authorized by Order 368 and 368-A, in Economic Regulatory Administration (ERA) Docket No. 86-48-NG. 8/ The terms of the underlying import arrangement would remain the same. The gas would be supplied by TransCanada PipeLines Limited (TCPL), exported from Canada and sold to Commonwealth by Alberta Northeast Gas, Ltd. (ANE), a Canadian corporation established by the Repurchasers, and transported in the U.S. by the Iroquois Gas Pipeline Transmission System (Iroquois) and the Tennessee Gas Pipeline Company (Tennessee). The application states that "there would be no change in the scope of the ANE project, the total volume of gas to be imported, the date of commencement or completion of the project, the source and security of the gas supply, the price and other terms of the transaction, or the

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5/ 1 FE 70,400 (January 16, 1991).

6/ 1 FE 70,426 (March 18, 1991).

7/ 1 FE 70,504 (November 11, 1991).

8/ On January 6, 1989, the authority to regulate natural gas imports and exports was transferred from the ERA to the Assistant Secretary of Fossil Energy. DOE Delegation Order No. 0204-127 specifies the transferred functions (54 FR 11436, March 20, 1989).

proven need for the supply." In addition, the application notes that the proposed gas sales agreement between ANE and Commonwealth is identical to the ones between ANE and the Repurchasers, including Boston Gas. Further, the natural gas would be transported to Commonwealth by Iroquois and Tennessee utilizing capacity previously associated with transportation of those same volumes to Boston Gas.

II. INTERVENTIONS AND COMMENTS

A notice of application was issued on November 6, 1991, inviting protests, motions to intervene, notices of intervention, and comments to be filed by December 9, 1991. 9/ The notice observed that DOE, in Orders 368 and 368-A, had determined that the Brooklyn Union import arrangements involved in the current transfer request were competitive, needed, secure, and environmentally acceptable, and, inasmuch as Boston Gas' assignment of volumes to Commonwealth does not alter the underlying import arrangements, intervenors should limit their comments to the effect that adding Commonwealth would have on the arrangements. On December 9, 1991, a joint motion to intervene was received from the Independent Petroleum Association of America and from various State producers associations 10/ in

9/ 56 FR 57324, November 8, 1991.

10/ The State Producer Associations are California Independent Petroleum Association, California Gas Producers Association, Independent Petroleum Association of Mountain States, Independent Petroleum Association of New Mexico, Louisiana Association of Independent Producers and Royalty Owners, Panhandle Producers and Royalty Owners Association, and

Texas Independent Producers and Royalty Owners Association.

opposition to the application. The intervenors (herein referred to as the Producers) request dismissal of the application, or, in the alternative, seek discovery and request an evidentiary hearing. This order grants intervention to all movants.

III. DECISION

The application filed by Brooklyn Union, on behalf of Boston Gas and Commonwealth, has been evaluated to determine if the proposed transfer of long-term import authorization meets the public interest requirements of section 3 of the NGA. Under section 3, an import must be authorized unless there is a finding that it "will not be consistent with the public interest." 11/ In making its section 3 determination the DOE is guided by its natural gas import policy guidelines, 12/ under which the competitiveness of the import in the market served is the primary consideration in meeting the public interest test. The DOE also considers, particularly in long-term arrangements, need for and the security of the imported gas supply.

A. Producer's Arguments

In requesting dismissal of the transfer application, the Producers state that DOE cannot make a determination on need for the proposed imports because of "unrest and turmoil" in the natural gas market. In addition, the Producers claim that the finding on need in Orders 368 and 368-A was erroneous and that there is no need for the gas. They assert that: (1) Orders 368

11/ 15 U.S.C. 717b.

12/ 49 FR 6684, February 22, 1984.

and 368-A relied on Federal Energy Regulatory Commission (FERC) market projections which have not materialized, (2) the fact that Boston Gas originally claimed to need the gas and is now assigning its contract volumes, indicates the gas is not needed, (3) imports have a regulatory advantage over domestic gas due to the "rate tilt" issue, which has a depressing effect on domestic exploration and development, and (4) the application should be treated as a new import authorization request and not as an amendment to an existing authorization.

The Producers request an evidentiary hearing to demonstrate the dampening effect the proposed imports would have on domestic drilling and other issues, and seek discovery to develop information on Commonwealth's system need for the gas and the availability of additional, less expensive, domestic supplies.

B. Discussion

As stated above, under the policy guidelines, competitiveness of the import in the market served is the primary consideration in meeting the NGA section 3 public interest test. In Orders 368 and 368-A DOE found the underlying import arrangements between TCPL and ANE, and ANE and the Repurchasers, were competitive. The proposed assignment does not affect or change these underlying arrangements, and, therefore, the DOE can rely on its earlier determination and conclude that the proposed import arrangement is competitive.

Under the DOE import guidelines, need for proposed imports is viewed as a function of marketability and gas is presumed to

be needed if it is found to be competitive. The proposed import arrangement has been found to be competitive. Accordingly, the proposed imports are presumed to be needed. The intervenors have not made any arguments or submitted any evidence sufficient to rebut the presumption of need.

The Producers assert that DOE cannot make a need determination because of "unrest and turmoil" in the natural gas marketplace, but it is precisely because we recognize that markets are variable and can fluctuate that the import guidelines emphasize flexible, market-responsive, competitive contractual arrangements as the best way to ensure that the natural gas will be needed over the life of the arrangements.

Also, the Producers' claim that the Orders 368 and 368-A finding of need was erroneous and argue that there is no need for the proposed imports. 13/ The Producers' arguments do not rebut the presumption of need. First, the determination of need in Order 368 and 368-A was not based on FERC market growth rate projections, but on the presumption that competitive import arrangements are needed. Second, the fact that large pipeline volumes of natural gas (regardless if the pipeline is only a transporter or an actual seller of gas) are assigned from one

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13/ The Producers stated in their intervention that Order 368-A is currently under appeal to the United States Court of Appeals for the D.C. Circuit. This is not correct. Order 368-A, a final authorization for which rehearing was denied on January 16, 1991 (Order 368-B), was not appealed and is not under review. Only Order 368-C, which conformed Order 368 to certain technical amendments in the Brooklyn Union import arrangements, has been appealed.

customer to another does not overcome the presumption of need arising from the competitiveness of the import arrangements. Third, Order 368 determined that the proposed imports would not have an unfair competitive advantage over domestic supplies due to the so-called "rate-tilt". Finally, the application is being treated as precisely what it is, a request to transfer an existing authorization. To the extent that the transfer does not effect the terms and conditions of the underlying import arrangement, the DOE can rely on its previous determinations regarding that arrangement when considering the transfer application.

Section 590.313 of FE'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. No party is entitled as a matter of right to a trial-type hearing on policy or legal issues.

The Producers requested an evidentiary hearing on the damping effects the proposed imports would have on domestic drilling. However, that issue is not relevant and material to the Department's decision. As was stated in Order 368: "DOE's policy is to encourage competition in the energy marketplace." 14/ Also, the other issues raised by the Producers for evidentiary hearings have been fully addressed in this order

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14/ 1 FE 70,285, at 71,216.

or in Orders 368 and 368-A, or are not relevant and material to a decision on the application. Accordingly, the Producers' request for an evidentiary hearing is denied.

Finally, the Producers requested discovery to obtain additional information regarding Commonwealth's projected demands for gas, and to develop data to demonstrate that less expensive supplies of domestic natural gas are available. The request for information regarding Commonwealth's projected demands for gas goes to the need for the proposed imports which has already been determined based on the competitiveness of the import arrangement. The Producers' other discovery motions pertain to the underlying import arrangement with ANE, which was found to be in the public interest in Orders 368 and 368-A, and is not subject to review here. Therefore, the request for discovery is denied.

C. Conclusion

After reviewing the record in this proceeding, I conclude that granting the transfer of 4,500 Mcf per day of import authorization, currently held by Boston Gas in the consolidated Brooklyn Union import authorizations, to Commonwealth, is not inconsistent with the public interest. 15/

15/ Because the proposed importation of gas will use existing facilities, DOE has determined that granting this application is clearly not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act (42 U.S.C. 4321, et seq.) and therefore an environmental impact statement or

environmental assessment is not required. See 40 CFR 1508.4 and 54 FR 12474 (March 27, 1989).

ORDER

Pursuant to section 3 of the Natural Gas Act, it is hereby ordered that:

A. Ordering Paragraph J of DOE/FE Opinion and Order No. 368 (Order 368), as amended by DOE/FE Opinion and Order No. 368-C (Order 368-C), is amended by adding Commonwealth Gas Company (Commonwealth) to the list of authorized importers.

B. Ordering Paragraph K of Order 368, as amended by Order 368-C and DOE/FE Opinion and Order 368-D, is amended by changing Boston Gas Company's pro rata share of the total authorization from 13,100 Mcf per day to 8,600 Mcf per day, and by adding Commonwealth to the list of authorized importers with a pro rata share of 4,500 Mcf per day of natural gas.

Issued in Washington, D.C., on December 19, 1991.

Clifford P. Tomaszewski
Acting Deputy Assistant Secretary
for Fuels Programs
Office of Fossil Energy