UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
ECONOMIC REGULATORY ADMINISTRATION

COLUMBIA LNG CORPORATION CONSOLIDATED SYSTEM LNG COMPANY) SOUTHERN ENERGY COMPANY	ERA DOCKET NO. 79-14-LNG

ORDER MODIFYING PRE-HEARING ORDER

On September 24, 1979, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued a Pre-Hearing Order which, inter alia, established schedules and procedures to be followed for an evidentiary hearing in this docket.

The order provided for the filing of any motions for modification of the order no later than October 2, 1979.

On October 1, 1979, ERA received a motion filed by the Attorney General of the State of Ohio, a party to the proceeding (hereinafter, "Ohio"), seeking modification of ERA's September 24 order. Ohio asked that the sections of the order pertaining to discovery be modified to provide for the taking of oral depositions since, in Ohio's view, documents regarding at least two issues (cost and balance of payments) had not been submitted by the applicants. As a result, according to Ohio, it would be unable to properly frame written interrogatories on those issues within the time allotted for discovery.

Ohio further recommended that the taking of oral depositions be allowed until October 26, 1979.

The September 24 order provided for limited discovery on an expedited basis, with return on discovery requests to be made at a discovery conference scheduled for October 9, 1979. All discovery requests were to have been served on all parties no later than 4:30 p.m., October 2, 1979, and discovery was to have been limited to service of written interrogatories and written requests for the production of documents.

The desire to reach an expeditious decision in this proceeding was expressed by all participants - including Ohio - at ERA's pre-hearing conference on September 14, 1979.

ERA believes that the procedures and schedules regarding discovery established in its order of September 24 are appropriate and that they would not deny any party a fair opportunity to prepare its case. Sufficient information is available concerning the two issues raised by Ohio for the parties to frame written interrogatories without the need for prior oral depositions; and ERA notes that Ohio did in fact serve a rather detailed interrogatory on one of the parties, Sonatrach, in accordance with the schedule set forth in the September 24 order. Further, while Ohio's request may have had some merit at the time at which it was framed, ERA would point out that the discovery conference which was held on October 9, 1979, gave the parties an opportunity to confer with each other. Ohio, which was present at the conference, therefore had essentially the same opportunity for exploration of the issues which it was seeking through the use of oral depositions. Therefore:

Order 1. The motion of Ohio is hereby denied.

On or about October 2, 1979, another party in this proceeding, the West Virginia Public Service Commission (hereinafter, "PSC"), filed a "Request for Modification of Pre-Hearing Order" with ERA. PSC asserted that a full development of the issues on the record in this proceeding required that DOE staff develop and place on the record their position on the issues defined in the September 24 order. PSC requested that DOE staff be made a party to this proceeding and be required to prepare and present evidence and advocate a position on the issues defined in this proceeding.

ERA believes that the more limited role established for DOE staff by the September 24 order is consistent with a full and impartial development of the record in this proceeding, and that the modifications to the order requested by PSC are neither necessary nor appropriate to satisfy the requirements of due process. Therefore:

Order 2. PSC's request is hereby denied.

On or about October 2, 1979, the People's Counsel of Maryland (hereinafter, "Maryland"), a party to the proceeding, filed with ERA a "Motion for Reconsideration and Clarification of the Prehearing Order." Maryland stated its objection to

a procedure whereby returns on discovery requests could be made only at the discovery conference scheduled for October 9, 1979. However, as was made clear at the discovery conference which was held on that date, the conference provided opportunity for the airing of objections to discovery requests and for reaching accommodations as to how outstanding returns would be made. The intent of the September 24 order was not to exclude returns on discovery which of necessity must be filed after the discovery conference. Similarly, the discovery conference on October 9 has rendered moot Maryland's request that such a conference be scheduled for October 12. ERA believes that the discovery conference which already has been held has afforded the parties ample opportunity to reach an agreement as to what kinds of information can and will be made available. Accordingly:

Order 3. The procedural modifications requested by Maryland, as described above, have been overtaken by events and are hereby denied.

Maryland also expressed concern that ERA's order of September 24 contemplated the possible acceptance by ERA of "non-unanimous stipulations." 1/ ERA hereby restates its position, expressed at the October 9 discovery conference, that it has no intention of accepting "non-unanimous stipulations," and that it will allow time for exchange of proposed stipulations among the parties. Therefore:

Order 4. The order of September 24 is hereby modified so as to provide expressly for service on all the parties of proposed stipulations no later than October 25, 1979, rather than October 30, 1979 (the time established for the evidentiary hearing) as provided in the September 24 order. Responses to proposed stipulations shall be served on all the parties no later than October 29, 1979.

Maryland further requested that provision be made for DOE staff to file a summary analysis at the conclusion of the hearing in this proceeding, to be served on all the parties so that they may comment on it in their post-hearing briefs. The decision in this proceeding will be made by ERA's Deputy Administrator for Policy. The role of DOE staff, as stated in the order of September 24, is a limited one,

1/ Motion, p. 14.

aimed at facilitating development of a full and impartial record and providing the parties an opportunity to comment on any information developed by DOE which will be relied on by the decisionmaker. It is not our intent, as explained in the earlier order, that DOE staff play an advocacy role like that performed by the FERC staff. Such a role would be inherent in the preparation of the analysis of the testimony, as requested by Maryland. Therefore:

Order 5. Maryland's request that staff file a summary analysis is hereby denied.

Maryland also asserted in its motion that our pre-hearing order states that requiring importers of LNG to contract for sales of the regasified LNG directly with distribution companies is a form of incremental pricing; that, coupled with the order's ruling that those favoring incremental pricing would have the burden of demonstrating that it is practicable and in the public interest, the characterization of requiring directly contracted supplies as a form of incremental pricing could be read as placing the burden of supporting direct contracting on the interveners; and that the order should therefore be clarified to state that the burden of proof on direct contracting shall be borne by the applicants.

In support of its position, Maryland argues that requiring direct contracting is an effective way of assuring that there is actually a need for the LNG and that this point has been clearly articulated by ERA in previous decisions.

The presumption in favor of directly committing imported LNG to distribution companies, Maryland asserts, thus has a completely independent basis from the basis for incremental pricing. The presumption flows from the requirement for the applicants in LNG import projects to establish need for the gas. Maryland states that, while the issue of need for the LNG at the increased price proposed by the applicants is not listed as one of the factual issues in the pre-hearing order, Maryland believes that issue is subsumed within issue 1(a): "Are reasonably-priced alternate supplies available in sufficient quantities to replace this gas supply." Since

the issue of need specifically has been raised by Maryland, and since ERA has in its previous decisions determined that there is a presumption in favor of supplies directly committed to distribution companies in order to test the need for the LNG, Maryland argues that the applicants must bear the burden of showing that distribution companies will directly contract for it or that the presumption should not be followed in this case. 2/

Two of the applicants in this proceeding--Consolidated System LNG Company (Consolidated) and Southern Energy Company (Southern)--filed a Response to the Motion and Interrogatories of the People's Counsel of Maryland at the discovery conference on October 9, 1979. This response did not address the specific issue raised above. At the conference, however, the applicants argued that this proceeding, unlike others in which ERA enunciated its presumption in favor of direct contracting, involves an ongoing project rather than a proposed project; and that the issue of need for the gas was determined by the Federal Power Commission when it authorized the project in 1972 and is therefore res judicata.

Maryland, on the other hand, argued at the conference that by amending the LNG purchase contract substantially, applicants have reopened this issue. 3/

ERA, after hearing arguments pro and contra, stated at the discovery conference that it would be inappropriate to use the application in this proceeding to modify most aspects of the Federal Power Commission's previous decisions concerning this import project. On the other hand, ERA indicated that the applicants' proposed modification of terms and conditions relating to price, which would result in a substantially higher import price, does serve to reopen all aspects of the previous orders that deal with the subject of price.

As stated at the discovery conference, ERA agrees with Maryland that the presumption in favor of direct sales contracts is precedential in this proceeding, and that the pre-hearing order should be amended to require the applicants to demonstrate one of two things: Either that the distribution companies served by this project will purchase the gas directly from the applicants, or that there is something about this case which distinguishes it from the precedents established in previous ERA decisions.

2/ Motion, pp. 2-4.

3/ Transcript of Proceedings, pp. 16-18.

In connection with this ruling, ERA stated at the discovery conference that the applicants shall have the burden of conducting a survey of the distribution companies served by this project to determine whether they are willing to enter into direct sales contracts. 4/

Order 6. For the reasons stated above, ERA hereby amends the September 24 order to provide expressly that the applicants, as part of their direct case, must address the presumption in favor of direct sales as described above. In addition, the applicants shall conduct a survey of their customers to determine if the latter are willing to enter into direct contracts for the purchase of the regasified LNG from this project on the terms and conditions of the contract amendment which applicants have asked ERA to approve. The results of this survey shall be filed with ERA and served on all parties by applicants in conformity with the schedule established in the September 24 order for the filing of prepared direct testimony and exhibits.

Maryland further argued that applicants should bear the burden of proving that incremental pricing should not be required in any final order issued by ERA in this proceeding. The response filed by Consolidated and Southern on October 9, 1979 contained vigorous argument in opposition, and the issue was debated at length at the discovery conference as well.

After hearing arguments on both sides, ERA determined that, with regard to the issue of incremental pricing, we remain open to argument on post-hearing brief that we are mandated to order incremental pricing in this case under the policy enunciated in the Natural Gas Policy Act (NGPA). Further, we stated our belief that, aside from the NGPA, ERA has the authority under Section 3 of the Natural Gas Act to require incremental pricing as a condition to approval of the application if we should find that it is in the public interest to do so.

However, ERA reiterated its view, stated in the September 24 order, that the burden of demonstrating that incremental pricing is in the public interest properly should be borne by those advocating that position. In ERA's opinion, the type of information that could be presented to demonstrate that incremental pricing is necessary or appropriate in this proceeding is not uniquely in the possession of the applicants, and the parties advocating incremental pricing can and should present such evidence as part of their direct case.

4/ Transcript, pp. 37-40.

Order 7. For the reasons stated above, Maryland's motion to modify ERA's order of September 24 with respect to shifting the burden of proof from those parties advocating incremental pricing to the applicants is hereby denied without prejudice.

ERA raised one further point at the discovery conference which was not raised by any of the parties to the proceeding. On October 6, 1979, there was an accident at the Cove Point LNG site which shut down the regasification facility. ERA, at the discovery conference, expressed its concern about what effect the accident might have on the ability of the parties to deliver the LNG at issue in this proceeding and on the timing of reaching a final decision. The applicants were asked to prepare a report on the accident to be filed with their prepared direct testimony. Therefore:

Order 8. The applicants shall provide ERA with a written report describing the aforementioned accident in detail and the effect it will have on this proceeding. The report shall contain but not be limited to the applicants' best estimate of the volume of gas deliveries that will be affected by the accident and the timing of restoration of full delivery capability of the facility. The report shall be filed no later than the time established for the filing of prepared direct testimony.

For the benefit of parties interested in reviewing the official files upon which the Federal Power Commission relied in publishing Order Nos. 622 and 622-A (FPC Docket Nos. 71-68, et al.), the official file is now open for inspection at the Central Files of the Federal Energy Regulatory Commission (FERC), Room 3410, 825 North Capital Street, N.E., Washington, D.C. Mr. Ted Spears of the FERC may be contacted for more information.

Issued in Washington, D.C., on October 18, 1979.

Douglas G. Robinson

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Deputy Administrator for Policy
Economic Regulatory Administration