

Cited as "1 ERA Para. 70,517"

El Paso Natural Gas Company. (ERA Docket No. 78-15-NG), October 17, 1980.

Order Denying the Application for Rehearing of Compania Minera De Cananea, S.A. de C.V. and Denying Requests for Further Stays

[Opinion and Order]

I. Introduction

On August 21, 1980, the Economic Regulatory Administration (ERA) of the Department of Energy issued DOE/ERA Opinion and Order No. 18, authorizing, with conditions to become effective on September 5, 1980, the export of natural gas by El Paso Natural Gas Company (El Paso) to Compania Minera de Cananea, S.A. de C.V. (Compania Minera). El Paso and Compania Minera twice filed motions to stay the effective date of the conditions set forth in Opinion and Order No. 18, and ERA granted three extensions of time, 1/ most recently delaying effectiveness of the conditions until October 19, 1980.

On September 9 and September 18, 1980, respectively, El Paso and Compania Minera filed applications for rehearing. Compania Minera challenges the condition in Opinion and Order No. 18 requiring that El Paso export gas to Mexico at the same price it imports gas from Mexico. El Paso objects not to the price increase, but to the further condition requiring it to pass on the revenues from the price increase to its domestic customers. El Paso's petition for rehearing was granted for the purpose of further consideration in Opinion and Order No. 18C.

In its application for rehearing, El Paso requested an informal conference to discuss alternate delivery arrangements for gas to Compania Minera. In Opinion and Order No. 18B and in telephone conversations, ERA notified the parties that this conference also would provide them the opportunity to discuss any other issues raised in this proceeding. The conference took place on September 26, 1980, with representatives of El Paso, Compania Minera, and DOE/ERA present. At the conference, representatives of El Paso described alternate delivery arrangements that would enable the Mexican national energy authority, Petroleos Mexicanos (Pemex), to supply gas to Compania Minera and other Mexican customers in the town of Cananea by means of transshipment through El Paso facilities in the U.S. Counsel for Compania Minera provided no new arguments or evidence, but joined El Paso in requesting that ERA stay the conditions in Opinion and Order No. 18 until such time as

the alternate arrangements were in place and were granted all necessary regulatory approvals.

II. Decision

Compania Minera cited three reasons in its petition for rehearing and during the conference to support reversal of the price increase. The first is that the condition specifying an export price of \$4.47 per MMBtu is unreasonable and is neither necessary nor appropriate. Compania Minera challenges the reasoning ERA used to develop the parity pricing policy and states that the benefits derived on this side of the border are far outweighed by the hardships to be sustained in Mexico.

Among the criteria ERA may consider in deciding import and export cases under section 3 of the Natural Gas Act is the reasonableness of the price of the import or export. 2/ ERA's Opinion and Order No. 18 established a policy of equal pricing for natural gas imports and exports from the same country on the grounds that it is inequitable for the U.S. to pay more to import gas than it charges for gas exports to the same country. The condition in that opinion requiring that the price of gas exported equal that of imports from the same country addresses inequities involved in both the balance of payments issue and the question of subsidization of the export by U.S. customers.

Requiring parity between export and import prices will assist the U.S. balance of payments. In addition, El Paso, as one of the participants in the Border Gas consortium, presently pays Pemex \$4.47 per MMBtu for its 15 percent of the 300 MMcf imported daily by Border Gas from Mexico into the U.S. 3/ This costly import is rolled in with less expensive price-controlled domestic gas, raising the cost of gas to the U.S. consumers served by El Paso. To the extent that gas exports to Mexico do not offset the cost of the imports in the average rate charged, consumers on El Paso's system pay a higher rolled-in price than they otherwise would, in effect subsidizing the export.

Furthermore, our responsibility to ensure that such transactions are not inconsistent with the public interest refers primarily to the public interest within the United States. Although representatives of Mexican interests, such as Compania Minera, may intervene in proceedings such as this one, responsibility to adjust the equities of natural gas costs for Mexican consumers lies elsewhere.4/ Thus, we remain convinced that the policy enunciated in Opinion and Order No. 18 is necessary and appropriate to further the public interest.

Compania Minera's second argument is that the time allowed for

adjustment to the price increase is unreasonably short. However, Opinion and Order No. 18 was not immediately effective and motions to stay its conditions have been granted by ERA three times. This has provided Compania Minera a period of approximately two months to accommodate itself to the price increase.

Moreover, the two months' stay and ERA's approval of its late intervention ^{5/} allowed Compania Minera to object, to file the application for rehearing under discussion here, to have its arguments fully considered and to make necessary adjustments before the price increase would take effect. The rehearing process provided by section 19 of the Natural Gas Act operates as a statutory safety valve for just such circumstances in which a party may be adversely affected by an administrative action for the first time. ^{6/}

Compania Minera's third argument in support of rehearing and against the conditions imposed by Opinion and Order No. 18 is premised on the portion of section 3 of the Natural Gas Act that states, "The Commission shall issue such order [approving a natural gas import or export] upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate. . . ." (Emphasis added.)

To the extent that Compania Minera asserts that section 3 gives a statutory right of opportunity for hearing by virtue of the conditions imposed by Opinion and Order No. 18, we agree.

Compania Minera was, however, provided this right of opportunity to offer evidence at the conference held by ERA on September 26, 1980. This conference, which took place fully one month after the initial order, was, according to Opinion and Order No. 18B and oral instructions given by ERA staff, intended to provide the opportunity to "present such additional relevant arguments and materials as [the parties] wish concerning these issues" raised in their submissions. At the conference, however, Compania Minera did not provide additional arguments or materials, allege that any material facts were in dispute, or make an offer of proof regarding evidence it wished to present in the evidentiary hearing it envisioned. When asked to explain why Compania Minera declined this opportunity, its counsel indicated that it desired a dull, formal evidentiary hearing and that the opportunity presented would not suffice.^{7/} In our view, the opportunity to which Compania Minera was entitled was provided.

Compania Minera also argues that under section 3 it is due a formal

evidentiary hearing with sworn testimony. Counsel for Compania Minera stated this position several times during the conference.^{8/} However, neither section 3 of the Natural Gas Act nor the Federal Energy Regulatory Commission's Rules of Practice and Procedure under which we operate automatically call into play the full panoply of formal adjudicatory administrative procedures. In this case, section 3 requires only "opportunity for hearing;" it does not mandate a formal hearing, sworn testimony, or similar procedures in each and every case. Even the Distringas statement relied upon by Compania Minera does not require full-blown evidentiary hearings, but rather "substantial record evidence."^{9/} Furthermore, it is well established that administrative procedures for decisionmaking under the Natural Gas Act may be tailored to meet the particular nature of the case at hand.^{10/} The policy decisions involved here having to do with the U.S. balance of payments and the subsidization of exports by U.S. gas consumers would not, in our opinion, benefit from the formal proceeding Compania Minera apparently envisions.

The absence of any material factual dispute in this case obviates any need for a formal evidentiary hearing. At the conference, counsel for Compania Minera expressed a desire to produce a witness from Mexico to discuss the impact of the price increase ordered in Opinion and Order No. 18.^{11/} There is no dispute that some hardship may result. ERA took this into account when making its determination, reaching a different conclusion than Compania Minera as to where the public interest lies. The case of *Pennsylvania Gas and Water Co. v. FPC*^{12/} is illustrative here. In that case, a natural gas customer objected to the FPC's order approving a settlement that provided a rate increase. The sole objecting customer, Penn Gas, asserted that the FPC denied it due process because its demands for a formal evidentiary hearing were denied. In a holding equally applicable to the matter at hand, the court found that Penn Gas was allowed to participate in informal conferences and file submissions before the FPC, yet failed to show any conflict of fundamental facts that would call for a hearing. In so finding, the court cited *Citizens for Allegan County v. FPC*, in which it was observed:

" . . . [T]he right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing. The precedents establish, for example, that no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law." ^{13/}

Therefore, no evidentiary hearing was required. As is the case here, the agency was aware of the arguments advanced, but drew different conclusions from those urged by the party requesting an evidentiary hearing.

In sum, none of Compania Minera's arguments supporting rehearing and challenging the conditions imposed by Opinion and Order No. 18 warrant reversing or otherwise modifying our previous order. No grounds have been advanced by either party in the petitions for rehearing, other filings, or at the conference which would warrant our not proceeding now to make parity pricing effective through the conditions in Opinion and Order No. 18. Although the alternate arrangements proposed by El Paso, if approved by the appropriate regulatory bodies, will eliminate the export, we have no assurance exactly when those arrangements will be in place and authorized (at the earliest it would be some time in 1981) and see no reason why a price increase should not be required in the interim. Therefore, the condition requiring the price increase will become effective on October 19, 1980 as provided in Opinion and Order No. 18C.14/

Order

For the reasons stated above, it is ordered that:

(1) The application for rehearing of Opinion and Order No. 18 submitted by Compania Minera de Cananea, S.A. de C.V. is hereby denied.

(2) The motions to stay further ordering paragraph 2 of Opinion and Order No. 18 proposed by El Paso Natural Gas Company and Compania Minera de Cananea, S.A. de C.V. are hereby denied.

Issued in Washington, D.C. on October 17, 1980.

--Footnotes--

1/ DOE/ERA Opinion and Order No. 18A (Sept. 4, 1980); DOE/ERA Opinion and Order No. 18B (Sept. 19, 1980); DOE/ERA Opinion and Order No. 18C (October 7, 1980). Opinion and Order No. 18B also granted El Paso's request for an informal conference.

2/ 15 U.S.C. Sec. 717b (1976); 42 U.S.C. Secs. 7151(b), 7172(f) (1976); DOE Delegation Order Nos. 0204-54 and 0204-55, 44 Fed. Reg. 56,735 (1979).

3/ See DOE/ERA Opinion and Order No. 16A (May 15, 1980).

4/ See, e.g., *Juarez Gas Company v. FPC*, 375 F.2d 595, 595, (D.C. Cir. 1967), wherein it was held that although a Mexican distribution company in competition with the proposed export had a right to intervene in the FPC proceedings concerning the export to Mexico, "it is for the authorities of

Mexico, and not for the Commission, to determine what [occurs] across the border."

5/ *Compania Minera* had not petitioned to intervene during the time period allowed in the notice of *El Paso's* application. (44 Fed. Reg. 7,995, February 2, 1979).

6/ In *Pan American Petroleum Corp. v. FPC*, 322 F.2d 999, 1003-4 (D.C. Cir. 1963), this provision was interpreted thusly:

"The plain purpose of the statutory provision for rehearing . . . is to provide opportunity for parties to challenge Commission action when they are thereby aggrieved for the first time, and for the Commission to consider such challenge before its action is subjected to judicial review."

7/ Transcript of DOE/ERA conference held in Docket No. 78-15-NG, September 26, 1980, at 34-38.

8/ *Id.*

9/ *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1064 (D.C. Cir.), cert. den. 419 U.S. 834 (1974).

10/ See, e.g., *Phillips Petroleum Company v. FPC*, 475 F.2d 842, 850 (10th Cir. 1973), cert. den. 414 U.S. 1146 (1974), and the cases cited therein.

11/ Transcript, *supra*, note 7, at 35. ERA convened the conference in part to provide *Compania Minera* the opportunity to present such a witness from Mexico.

12/ 463 F.2d 1242 (D.C. Cir. 1972).

13/ 414 F.2d 1125, 1128 (D.C. Cir. 1969).

14/ Other natural gas exports may also be priced below the price of imports from the same country. We are now taking steps to determine whether these other export authorizations should be amended to include the same conditions as this authorization.