Cited as "1 ERA Para. 70,509"

Border Gas, Inc. (ERA Docket No. 79-31-NG), February 29, 1980.

Order Denying Applications for Rehearing of Opinion and Order No. 12

[Opinion and Order]

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I. Background

In Opinion and Order No. 12, issued on December 29, 1979, the Economic Regulatory Administration (ERA) authorized Border Gas, Inc. (Border), a concern formed by six U.S. energy companies,1/ to import up to approximately 300 million cubic feet per day (MMcf/d) of natural gas from Mexico into the United States through existing facilities. An initial base price of $3.625 (U.S.) per million Btu, subject to quarterly escalation in accordance with a preestablished formula, was approved.

ERA granted the import, authorization for the initial 300 MMcf/d pursuant to the terms of Border's Contract of Purchase and Sale of Natural Gas (Purchase Contract) entered into with Petroleos Mexicanos (Pemex), the Mexican state oil company, on October 19, 1979.

Opinion No. 12 stated that the ERA approval of December 29, 1979, is limited to the initial deliveries of approximately 300 MMcf/d through the "Secondary Point of Delivery" and that nothing in the approval should be read as implying any decision on further imports through any new facilities that would have to be constructed to increase imports above the approved 300 MMcf/d. The opinion made it clear that the sale and delivery of quantities of natural gas in excess of approximately 300 MMcf/d will require Border Gas to file with ERA applications for authority to import increased volumes pursuant to Section 3 of the NGA.

II. The Applications for Rehearing

Natural Gas Pipeline Company of America (Natural), United Gas Pipeline Company (United), and the State of Louisiana (Louisiana) (collectively, "the petitioners") filed applications for rehearing of Opinion No. 12 by January 28, 1980.

On February 14, 1980, Border filed a response in opposition to the applications for rehearing, and on February 24, 1980, United filed an opposition to the Border response.

The three petitioners support Opinion No. 12 to the extent it authorized Border's initial importation of 300 MMcf/d of Mexican natural gas, but request rehearing on the limited issue of ERA's failure to institute promptly a proceeding to determine whether the exclusivity clause in the Purchase Contract between Border and Pemex is inconsistent with the public interest insofar as it applies to future imports of Mexican gas.

The exclusivity clause in question gives Border the exclusive right to purchase from Pemex all future imports of Mexican natural gas above the initial 300 MMcf/d. Such provision, the petitioners contend, is contrary to the public interest, anticompetitive, and discriminatory. They assert, for example, that the exclusionary provision raises serious restraint of trade and monopolization issues under Sections 1 and 2 of the Sherman Act. The petitioners argue that resolution of these issues should not be deferred until Border makes application to import additional volumes of Mexican gas, for they claim that other U.S. companies are effectively precluded from direct contract negotiations with Pemex as long as the Border/Pemex contractual provisions are in effect. The three petitioners therefore request a "second phase" hearing to explore the exclusivity issues.

United and Louisiana state that they are also concerned about the geographic effect of the contractual provisions. They submit that the six Border companies sell only insignificant volumes of natural gas to Louisiana and other portions of the Gulf Coast region and that discrimination against any interstate pipeline company automatically means discrimination against the particular area it serves.

Border, in its response,2/ stated that applications for rehearing under Section 19 of the Natural Gas Act (NGA) are permitted to be filed with ERA only with respect to an ERA order which finds that a proposed gas import is not consistent with the public interest, and that all other requests for rehearing under Section 19 of the NGA must be filed with the FERC. Since ERA

held in this proceeding that the importation of the initial 300 MMcf/d was in the public interest, and deferred consideration of other issues, Border asserted that applications for rehearing of the order do not lie with ERA. Border further asserted that United and Louisiana, in their applications for rehearing, raise for the first time issues relating to national antitrust laws, which they claim fall within the residual jurisdiction of the FERC in gas import cases, and that in any event no case has been made on the merits that there is presented here an unlawful restraint of trade in violation of the antitrust law.

III. Conclusions

ERA recognized, in Opinion No. 12, that interveners in the proceeding (the three petitioners plus Panhandle Eastern Pipeline Company and Trunkline Gas Company) raised objections to the contract between Pemex and Border insofar as it purported to limit future deliveries above 300 MMcf/d exclusively to Border. In that opinion we specifically indicated that our approval was limited to the initial volumes of gas imported through the Secondary Point of Delivery.

We are mindful of the argument made by the petitioners that unless and until the exclusionary provision of the Purchase Contract are expressly voided by a U.S. regulatory agency, they and other companies not affiliated with Border may be effectively precluded from negotiating with Pemex the purchase of additional volumes of Mexican gas. However, we continue to believe that it would be premature to address the issues raised in the applications for rehearing in the absence of a specific application to import specific volumes of additional gas. We emphasize that we did not intend in Opinion No. 12 to indicate that we were giving even tacit approval to the exclusion provisions or any other features of the Purchase Contract insofar as they apply to volumes of gas in excess of the initial 300 MMcf/d.

The petitioners are not likely to be prejudiced by deferral of the issues they raised until an application has been filed to import additional volumes, since they are free to discuss with Pemex the purchase of gas in the event ERA does not approve the exclusivity provisions.3/ It is also not clear that the petitioners would be prejudiced if Pemex refused to deal with them until after an ERA decision on a future application is issued, since Border is not able to import additional volumes of gas under the current contract or to construct facilities to deliver such volumes until ERA and Federal Energy Regulatory Commission (FERC) approval is obtained. If ERA ultimately determines that the petitioners or other companies should have access to Mexican gas, we see no reason why that could not be accomplished through the

attachment of appropriate conditions to any future import approval.

One final issue raised in Border's response to the applications for rehearing should be addressed. Contrary to Border's assertion, we believe the petitioners' applications for rehearing lie with ERA, at least to the extent they seek rehearing of issues decided by the ERA in Opinion No. 12. If applications for rehearing of all issues resolved by ERA in a case in which import approval was granted lie only with the FERC, there would effectively be created a right to appeal ERA decisions in such cases to the FERC. That right clearly was not intended by the Secretary of Energy's orders delegating functions to the ERA and the FERC, respectively. DOE Delegation Order No. 0204-54 (44 F.R. 56735, October 2, 1979) delegates to ERA the authority granted the Secretary by Sections 301 and 402(f) of the Department of Energy Organization Act, P.L. 95-91, 91 Stat. 565, and states that ERA shall determine whether a natural gas import is in the public interest by considering certain enumerated criteria and "[s]uch other matters within the scope of Section 3 . . . as the Administrator shall find in the circumstances of a particular case to be appropriate for his determination. The issue of alleged anticompetitive effect is an issue which we deemed appropriate to consider and was addressed in Opinion No. 12.

Order

In consideration of the foregoing, the Economic Regulatory Administration hereby orders:

Pursuant to Section 19 of the Natural Gas Act and Delegation Order No. 0204-54, the applications mf Natural Gas Pipeline Company of America, United Gas Pipeline Company, and the State of Louisiana for rehearing of DOE/ERA Opinion and Order No. 12 are hereby denied.

Issued in Washington, D.C., on February 29, 1980.

--Footnotes--

1/ Tennessee Gas Pipeline Company, Texas Eastern Transmission Corporation, El Paso Natural Gas Company, Transcontinental Gas Pipeline Corporation, Southern Natural Gas Company, and Florida Gas Transmission Company.

2/ Although 18 C.F.R. Sec. 1.34(d) specifically provides that responses to applications for rehearing will not be entertained, we believe it appropriate to consider and dispose or Border's response because it raises

fundamental issues regarding the jurisdiction of ERA to rule on the applications for rehearing.

3/ We also note that Pemex's willingness to negotiate at this time with companies not affiliated with Border cannot be dictated by any order issued by ERA. Even if ERA followed the course of action suggested by the petitioners, there is no assurance that Pemex would negotiate with them for the sale of gas.