Cited as "1 ERA Para. 70,510"

Border Gas, Inc. (ERA Docket No. 79-31-NG), March 27, 1980

# Order Granting Interim Emergency Approval to Border Gas, Inc. to Pay an Increased Price for Natural Gas Imported from Mexico

[Opinion and Order]

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## I. Background

### A. Initial Contract and Order

On September 21, 1979, the governments of the United States and Mexico issued a joint announcement of their agreement on a framework for the sale of 300 million cubic feet per day of natural gas by Petroleos Mexicanos (Pemex), the Mexican state oil company, to U.S. purchasers. The announcement stated that both countries agreed to authorize and support, as a matter of public policy and subject to the approval of Mexican and U.S. governmental agencies, commercial transactions within the framework established. The framework provided, inter alia, an initial base price of $3.625 (U.S.) per million Btu (MMBtu), subject to quarterly escalation in accordance with a formula to be specified in the resulting contracts for purchase. It also provided that the $3.625 price could be reconsidered prior to January 1, 1980, if the price for natural gas from comparable sources should exceed that amount prior to that date.

Pursuant to the Mexico-U.S. agreement, Border Gas, Inc. (Border), was formed by the six U.S. purchasers selected by Pemex to facilitate the purchase of natural gas from Mexico. Those six purchasers are Tennessee Gas Pipeline Company, a Division of Tenneco, Inc.; Texas Eastern Transmission Corporation (which in turn sells one-third of its entitlement to an affiliated company, Transwestern Pipeline Company); El Paso Natural Gas Company; Transcontinental Gas Pipe Line Corporation; Southern Natural Gas Company; and Florida Gas Transmission Company. Border and Pemex executed a Contract of Purchase and Sale (Contract) on October 19, 1979 which implemented the terms of the framework reached by the two governments, and provides, with respect to quarterly price escalation, a formula based on increases in the prices of selected crudes.

In Opinion and Order No. 12, issued on December 29, 1979, the Economic Regulatory Administration (ERA) authorized Border to import, pursuant to the terms of the Contract, up to approximately 300 MMcf/d of natural gas from Mexico into the United States through existing facilities. On December 21, 1979, the Federal Energy Regulatory Commission (FERC), in Docket Nos. CP80-93, et al., issued an order approving the transportation arrangements in the U.S. for delivery of the gas and allowing the purchasers to flow through to their customers the price paid to Pemex plus certain incidental expenses.

Pemex commenced deliveries to Border on January 15, 1980, at the specified level. Those deliveries have continued to the present.

B. ERA Opinion and Order No. 14

On February 16, 1980, the ERA issued Opinion and Order No. 14 authorizing on an interim basis the continued importation of natural gas from Canada at the newly established border price of $4.47 (U.S.) per MMBtu, an increase over the previous border price of $3.45. ERA's temporary approval, effective February 17, 1980, through May 15, 1980, was limited to flowing gas volumes. While the ERA determined that the new price of $4.47 per MMBtu was higher than the price of alternate fuels and was therefore unreasonable standing alone, temporary approval was granted to prevent the potential adverse consequences resulting from an immediate shut-off of such volumes to dependent purchasers. While the interim price is in effect, the ERA will conduct further proceedings to determine whether and on what terms Canadian natural gas imports should be permitted after May 15, 1980.

C. Pemex Letter and Border Petition

On March 21, 1980, Border filed a petition requesting that both ERA and the FERC amend the authorization granted to Border in Opinion and Order No. 12 such that Pemex would receive a price for its natural gas sales to Border equal to the higher of the price determined by application of the formula contained in the contract or the Canadian border price for natural gas established by the Canadian National Energy Board and authorized by the U.S. Government. This change would be effective retroactively to March 1, 1980 and would therefore effectively result in approval of a price for Mexican gas from March 1, 1980 of $4.47 (U.S.) per MMBtu, the price which ERA temporarily approved for flowing Canadian gas in Opinion and Order No. 14.

On March 25, 1980, Border filed a motion with ERA and the FERC requesting that the agencies act "immediately" to issue an "emergency" approval of the proposed contract amendment.

The circumstances underlying Border's request for approval of the amendment and for consideration on an expedited basis are alleged as follows: On February 27, 1980,1/ Pemex wrote Border a letter demanding an adjustment to the price formula in the Border/Pemex contract to make the price equal to the higher of either the contract price or the Canadian border price. As stated in the February 27, 1980 letter, Pemex believes that the negotiations leading to the Mexican-U.S. Joint Announcement of September 21, 1979 contemplated that Pemex would always receive a gas price at least equal to the price paid by U.S. pipelines for gas from Canada, the source most comparable to Pemex.

Pemex stated that all parties to the government-to-government negotiations assumed that the Canadian border price would increase prior to January 1, 1980, and thus the Mexican-U.S. Joint Announcement made provision for adjustment of the initial price to reflect Canadian price increases occurring prior to January 1, 1980. However, Canada did not announce another increase in its border price until January 17, 1980 effective February 17, 1980. Pemex asserts that this difference in timing resulted in a circumstance unexpectedly different from the basic economic assumptions on which the Pemex-Border contract was authorized by the Mexican Government.

Accordingly, Pemex has now insisted that, notwithstanding the pricing mechanism established for Mexican imports by the Pemex/Border gas sales contract, Pemex receive a price adjustment. This proposed adjustment would leave unaltered the basic pricing formula approved for Mexican imports in Opinion and Order No. 12. However, it would provide, effective March 1, 1980, for the higher of the price derived from such pricing mechanism or the approved Canadian border price for flowing natural gas.

In its motion for emergency action, Border stressed the necessity for immediate approval of the requested adjustment, without the customary period for notice and comment. It stated that:

> It is Border's belief that in light of the insistence of Pemex on an adjustment to become effective March 1, 1980, and the length of time that has elapsed since this demand was first presented, a clear danger exists that further deliveries from Pemex and the continued viability of this arrangement may be jeopardized unless prompt U.S. regulatory approvals are secured. As stated in Border's petition, in light of the approval granted for the increased Canadian border price, it would be contrary to the public interest to deny such an adjustment to Pemex, thereby imperiling the continued importation of natural gas from Mexico. To prevent such a result, the ERA and the FERC should act immediately to grant the adjustment requested by Pemex. (p. 3.)

## II. Discussion and Conclusions

### A. The Need for a Price Increase

At the outset, we should note that the submission made by Border to support its petition leaves much to be desired in terms of its completeness and persuasiveness. First, it does not contain a copy of the contract amendment or even aver that such an amendment has been entered into. We are left to guess at the precise terms of the amendment by referring to the February 27, 1980 letter from Pemex to Border. Second, Border's petition and subsequent motion are vague and inconclusive as to precisely when relief is required and why action must be taken on an emergency basis.

Notwithstanding the deficiencies in the petition, we feel compelled, in view of the important foreign policy considerations present in this instance, to take notice of ongoing discussions between the United States and Mexico, as well as the United States and Canada, to establish a predictable, uniform and equitable means of establishing stable prices for the importation of gas from those two countries.

This process resulted yesterday in the announcement by the Secretary of Energy and the Canadian Minister of Energy, Mines and Resources of the completion of discussions on a mechanism for determining the export price of Canadian gas. The mechanism which the Canadians announced they would use in the future to determine their gas export prices should result in greater price predictability and market stability, provided that the prices are consistent with the prices of alternate fuels in U.S. markets. We note, however, that a final determination as to whether this pricing mechanism is consistent with the public interest must await completion of the procedures outlined in Opinion and Order No. 14, including the receipt of petitions to intervene and comments.

Representatives of the U.S. Government have also had similar discussions in recent weeks with the Government of Mexico for the purpose of achieving a similar result with regard to Mexican gas prices. It is apparent from these discussions that an important element in reaching the desired result is approval of the concept that Mexican prices will be at a level consistent with prices approved by the U.S. regulatory agencies for natural gas imports from Canada. The purpose of Pemex's February 27, 1980 letter to Border requesting amendment of the Contract effective March 1, 1980 and Border's subsequent petition to ERA for emergency relief was to obtain U.S. regulatory approval of the concept of parity as quickly as possible. Approval of the concept has been insisted upon by the Mexican government as a predicate to continued sales of Mexican gas and future discussions regarding U.S.-Mexico energy and trade relations.

In addition to the Border filings, ERA has received a communication from the U.S. Department of State, a copy of which is attached hereto as an Appendix, which sets forth the importance of prompt approval of the concept of parity in maintaining and improving relations between the two countries.

We are persuaded that it would not be consistent with the public interest to insist upon continuation of Mexican gas imports consistent with the pricing terms of the October 19, 1979 Contract. Even if, contrary to Pemex's assertions, it was not the original intention of the two governments to achieve approximate parity with Canadian prices, the significant changes in crude oil and alternate fuel prices in the past several months and the disruptive effect this has had on U.S. gas markets, the U.S. regulatory process and our energy relations with both Canada and Mexico convince us that it is in the United States' interests to establish a stable and equitable relationship between Canadian and Mexican import prices.

Thus, while Border might have a contractual right to insist upon the performance of the Contract as originally agreed to, we are convinced that such insistence would not be consistent with the public interest. For the foregoing reasons, we are approving a price increase to $4.47 per MMBtu, prospective from the date of this Order and as long as the current regulatory approval of the same price for flowing Canadian gas is in effect. In Opinion and Order No. 14 we approved a price of $4.47 per MMBtu for Canadian gas on an interim basis until May 15, 1980. The approval of the Mexican price will be on the same interim basis, commencing on March 27, 1980.

All that we are approving at this time is a temporary price increase for flowing gas that will put Mexican gas prices on an equal footing with Canadian gas prices for a 50-day period, in order that government-to-government discussions can proceed toward the development of a more permanent arrangement. While we are reluctant to approve any price increase on an emergency basis, we have been charged in applying Section 3 of the Natural Gas Act to take into account the important underlying foreign relations considerations as described in the State Department communication. We are not at this time, however, approving the specific petition filed by Border to amend our previous authorization to allow the higher of the Contract price or the Canadian price, and we are not at this time authorizing a price increase retroactive from the date of this decision.

B. Further Proceedings

While the interim price is in effect, ERA will develop a thorough administrative record upon which a decision will be made as to whether the pricing formula should be instituted as a permanent amendment to Opinion and Order No. 12, thereby allowing Pemex the higher mf the contract or the Canadian border prices, and if so, whether it should be applied retroactively to March 1, 1980, as requested by Border.

In that regard, Border shall submit to ERA by April 24, 1980 a written statement of why the ERA should extend approval of the new price beyond May 15, 1980. The statement should contain as much factual material as possible. It may address any area of concern to Border but should specifically address the following matters:

1. Whether the pricing formula amendment described in its petition should be approved as a permanent amendment to Opinion and Order No. 12, thereby allowing Pemex to receive the higher of the Contract price or the Canadian border price. In particular, the following issues should be discussed:

a. Whether the pricing mechanism will result in prices that are both fair and reasonable to U.S. consumers and competitive with prevailing prices for alternate fuels in the U.S. markets in which the gas is sold.

b. Whether the volumes authorized in Opinion and Order No. 12 are needed, nationally or regionally, at the price resulting from the mechanism for which Border seeks approval.

2. Why, if the formula is instituted permanently, it should also be made retroactive to March 1, 1980 as requested by Border.

Border shall also submit to ERA by April 24, 1980 the specific language of the proposed amendment to the Contract.

In addition, petitions to intervene may be filed by any interested party no later than 4:30 p.m. on April 17, 1980. Such petitions are to be filed with the Import/Export Division, Office of Petroleum Operations, Economic Regulatory Administration, Room 4126, 2000 M Street, N.W., Washington, D.C. 20461, in accordance with the requirements of the rules of practice and procedure (18 CFR 1.8). Any party who requests an evidentiary hearing in this proceeding should so indicate in the petition for intervention.

Any person wishing to become a party to these proceedings must file a petition to intervene. Any person desiring to make any protest with reference to the petitions to intervene may file a protest with the ERA in the same manner as indicated above for petitions to intervene. All protests will be considered by ERA in determining the appropriate action to be taken on petitions to intervene, but will not serve to make protestants parties to the proceeding.

All persons who have filed timely petitions for intervention are also invited to submit comments on the issues listed above and other relevant issues by April 24. All submissions must be served on Border and all persons who have filed timely petitions for intervention in this docket. A list of interveners and petitioners for intervention will be maintained by ERA's Import/Export Division at the address indicated above (telephone (202) 653-3859). Comments shall be filed with that office and shall conform to the provisions of the procedural rules applicable to written submissions.

Responses to comments submitted to ERA will be accepted through May 1, 1980.

ERA will determine, on the basis of requests therefor and a review of the written submissions, whether an evidentiary hearing is necessary and appropriate. If such a hearing is determined to be necessary, due notice will be given to all parties.

Copies of all applications, petitions for intervention and written submissions to ERA are available for public inspection and copying in Room 4126, 2000 M Street, N.W., Washington, D.C. 20461, between the hours of 8:00 a.m., and 4:30 p.m., Monday through Friday, except Federal holidays.

## III. Order

For the reasons set forth above, ERA hereby orders that:

A. Pursuant to authority under Section 3 of the Natural Gas Act, the order previously granted to Border Gas, Inc. (ERA 79-31-NG) authorizing the importation of natural gas from Mexico at $3.625 per MMBtu is hereby temporarily amended to permit the import of previously authorized volumes at $4.47 per MMBtu, effective March 27, 1980, through May 15, 1980.

B. Except as modified by paragraph A, all other terms and conditions in Opinion and Order No. 12 authorizing the importation of natural gas from Mexico shall remain in effect.

Issued in Washington, D.C., March 27, 1980.

--Footnote--

1/ For reasons that are unexplained in the petition, the February 27 letter from Pemex which describes the proposed terms mf and rationale for an amendment appears not to have been actually sent to Border until at least March 5, 1980 under a separate cover letter.

## Appendix

Mr. Douglas G. Robinson
Deputy Administrator for Policy
Economic Regulatory Administration
2000 "M" Street, N.W.
Washington, D.C. 20461

Dear Mr. Robinson:

From the standpoint of the foreign relations of the United States, I would like to emphasize the importance of the Economic Regulatory Administration's rendering expeditiously a decision which would ensure comparability of prices paid to Mexico and Canada for natural gas. We believe that this matter is urgent. Without a prompt, favorable ruling, it is our judgment that the continuing supply of Mexican gas will be adversely affected.

There are important foreign policy interests at stake. Natural gas purchases from Mexico have been a critical issue between our two countries for several years and affect the whole range of economic and political issues between us.

Sincerely,
Deane R. Hinton