Cited as "1 ERA Para. 70,531"

Pacific Gas Transmission Company (ERA Docket No. 81-09-NG), June 11, 1981.

Great Lakes Gas Transmission Company (ERA Docket No. 81-10-NG), June 11, 1981.

Northwest Pipeline Corporation (ERA Docket No. 81-11-NG), June 11, 1981.

Inter-City Minnesota Pipelines Ltd., Inc. (ERA Docket No. 81-12-NG), June 11, 1981.

St. Lawrence Gas Company, Inc. (ERA Docket No. 81-13-NG), June 11, 1981.

Transcontinental Gas Pipe Line Corporation (ERA Docket No. 81-14-NG), June 11, 1981.

Transcontinental Gas Pipe Line Corporation (ERA Docket No. 81-15-NG), June 11, 1981.

Midwestern Gas Transmission Company (ERA Docket No. 81-16-NG), June 11, 1981.

Tennessee Gas Pipeline Company (ERA Docket No. 81-17-NG), June 11, 1981.

Michigan Wisconsin Pipe Line Company (ERA Docket No. 81-18-NG), June 11, 1981.

Northern Natural Gas Company (ERA Docket No. 81-19-NG), June 11, 1981.

Vermont Gas Systems, Inc. (ERA Docket No. 81-20-NG), June 11, 1981.

The Montana Power Company (ERA Docket No. 81-21-NG), June 11, 1981.

DOE/ERA Opinion and Order No. 29A

Opinion and Order Denying the Applications for Rehearing of the Process Gas Consumers Group/The American Iron and Steel Institute and Vermont

Gas Systems, Inc.

[Opinion and Order]

I. Introduction

On March 27, 1981, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 29 amending the existing authorizations of twelve companies to import natural gas from Canada.1/ Eleven of the companies were authorized to pay the new border price of U.S. $4.94 per MMBtu (U.S. $4.60 per GJ) effective April 1, 1981.2/ Because the principal issue in these dockets is whether the proposed border price of $4.94 per MMBtu is reasonable and therefore not inconsistent with the public interest, all the dockets were consolidated for decision. Opinion and Order No. 29 also granted all petitions to intervene.

The Process Gas Consumers Group (PGC) and the American Iron and Steel Institute (AISI) jointly filed an Application for Rehearing of Opinion and Order No. 29 on April 24, 1981. On that date, Vermont Gas Systems, Inc. (Vermont Gas) also filed an Application for Rehearing. Neither of those applications opposed the continued importation of Canadian gas at current levels, nor did they oppose ERA's authorization for the applicants to pay the new Canadian border price.

PGC and AISI request rehearing of ERA's decision in Opinion and Order No. 09 not to reconsider in the context of this docket its earlier decision in Opinion and Order No. 14 3/ to require incremental pricing of certain Canadian natural gas volumes. PGC and AISI further request that ERA reconsider the position taken in Opinion and Order Lo. 14 that incremental pricing automatically applies to volumes which exceed both the volumes of gas imported into the United States during any "corresponding period" of 1977 and the maximum delivery obligations specified in contracts entered into on or before May 1, 1978, and in effect when such delivery occurs. PGC and AISI argue that ERA erred in its conclusion that it has no discretion to exempt from incremental pricing Canadian import volumes in excess of 1977 base year volumes or levels specified in contracts entered into on or before May 1, 1978, whichever is greater, and they urge, as a policy matter, that ERA should exercise its discretion.

Vermont Gas raises two issues in its Application for Rehearing. First, it argues that ERA erred in granting the petition to intervene filed by PGC and AISI in Docket No. 81-20-NG, one of the thirteen dockets consolidated for decision by Opinion and Order No. 29 and the docket in which Vermont Gas is

the applicant. Second, Vermont Gas contends that ERA erred in consolidating its case (Docket No. 81-20-NG) with the other applications considered by Opinion and Order No. 29.

II. Decision

A. PGC and AISI

PGC and AISI make both legal and policy arguments to support their request that ERA reexamine its decisions with regard to the incremental pricing of Canadian gas imports. Their legal position is that ERA erred in Opinion and Order No. 14 in concluding that volumes of non-LNG imports in excess of both 1977 base levels and the maximum delivery obligations specified in contracts entered into on or before May 1, 1978 are "automatically subject" to incremental pricing. PGC and AISI argue that contrary to the conclusion stated in Opinion and Order No. 14, ERA has discretion under section 207(c)(2) of the Natural Gas Policy Act of 1978 (NGPA) to exempt from incremental pricing all Canadian natural gas imports in excess of 1977 base volumes, including volumes specified in contracts entered into after May 1, 1978. They further argue that, as a policy matter, ERA should exercise that discretion, and they seek rehearing of ERA's failure to do so in Opinion and Order No. 29.

PGC and AISI's legal position is inconsistent with both the statutory language and the pertinent legislative history of the NGPA. In supporting their legal position, the applicants distort the relevant statutory language by taking section 207(c)(2) out of its proper context in relation to NGPA sections 203 and 207(b) and also by misreading section 207(c)(2).

Section 203(a)(5) establishes the general requirement that imports of natural gas other than liquefied natural gas (LNG) shall be incrementally priced:

> (a) IN GENERAL.--The following costs shall be subject to the passthrough requirements of the rule prescribed under section 201 (including any amendment under section 202):
>
> * * *
>
> (5) NATURAL GAS (OTHER THAN LNG) IMPORTS.--Subject to section 207, in the case of natural gas (other than liquefied natural gas) imported into the United States, any portion of the first sale acquisition cost of such imported natural gas which exceeds the maximum

lawful price, per million Btu's computed under section 102 (relating to new natural gas) for the month in which such natural gas enters the United States, without regard to section 110. (Emphasis added.)

Because the application of the general rule is made "subject to section 207," its operation is conditioned by the provisions of section 207. While PGC and AISI rest their argument on only one part of that section--subsection (c)(2)--the clear language of section 203(a)(5) makes the application of incremental pricing subject to all relevant provisions of section 207. The first pertinent provision, therefore, is section 207(b), which limits the application of the general rule by exempting from incremental pricing all imports except those as follows:

(b) CERTAIN NATURAL GAS IMPORTS (OTHER THAN LNG).--Subject to subsection (c)(2), the provisions of section 203(a)(5) shall only apply to the passthrough of the first sale acquisition costs of volumes of natural gas (other than liquefied natural gas) imported into the United States which exceeds both--

(1) the maximum delivery obligations, for the month in which such delivery of such natural gas occurs, which is specified in contracts entered into on or before May 1, 1978, and in effect when such delivery occurs; and

(2) the volume of natural gas imported into the United States by the interstate pipeline involved during any corresponding period (determined appropriate by the Commission) of calendar year 1977.

These are limiting provisions. They establish strict requirements for the application of incremental pricing under section 203(a)(5). Incremental pricing shall apply only if the imports in question exceed both 1977 import levels and levels specified in contracts entered into on or before May 1, 1978. Otherwise incremental pricing does not apply under the Section 207(b) provisions. Conversely, incremental pricing must be applied if the two conditions set forth in Section 207(b) are met.

Section 207(b) is itself "subject to" and is, therefore, modified by section 207(c)(2), which states:

(2) NATURAL GAS IMPORTS (OTHER THAN LNG).--The provisions of section 203(a)(5) shall apply to the passthrough of the first sale acquisition costs of volumes of natural gas (other than liquefied natural gas) imported into the united States which exceed the volume of natural

> gas imported into the United States by the interstate pipeline involved during any corresponding period (determined appropriate by the Commission) of calendar year 1977 if, in connection with the granting of any authority under the Natural Gas Act to import such natural gas, the Secretary of the Department of Energy or the Commission, in accordance with the assignment of functions, under the Department of Energy Organization Act, determines that the provisions of section 203(a)(5) shall apply with respect to such natural gas imports. (Emphasis added.)

By its own terms, section 007(c)(2) limits the section 207(b) exemption from incremental pricing. As indicated by the plain language of subsection (c)(2), the Secretary has discretion to apply incremental pricing where subsection (b) would otherwise preclude such discretion. Section 207(c)(2) does not, as the applicants contend, give the Secretary the discretion to exempt from incremental pricing volumes of gas required to be incrementally priced by operation of sections 203(a)(5) and 207(b). Therefore, under section 207(c)(2) the Secretary has discretion to extend incremental pricing to volumes which are not automatically incrementally priced by virtue of sections 203(a)(5) and 207(b).4/

These provisions, then, create three categories of natural gas imports for pricing purposes. First, all volumes equal to or below 1977 base levels are exempt from incremental pricing. Second, volumes in excess of both 1977 base levels and May 1, 1978 contract levels must be incrementally priced. Third, DOE has discretion to price incrementally volumes in excess of 1977 levels but equal to or below levels specified in contracts entered into on or before May 1, 1978. These volumes are exempt from incremental pricing unless DOE determines to apply incremental pricing. These are the only volumes over which DOE may exercise discretion.5/

The legislative history of the NGPA plainly supports the conclusion that volumes of imported pipeline gas in excess of both 1977 levels and levels specified in contracts entered into on or before May 1, 1978, must be incrementally priced. The conference report states:

> The conference agreement exempts other [non-LNG] natural gas imports from incremental pricing if the volume of such imports does not exceed the volume of natural gas imported into the United States during calendar year 1977. The conference agreement does not require incremental pricing for natural gas imports pursuant to contracts entered into on or before May 1, 1978, although the Secretary of Energy is authorized to determine if such import volumes will be subject to incremental pricing.

* * *

New natural gas imports, which are projects not described in this section, are treated under sec. 203. H.R. Rep.No. 95-1752, 95th Cong., 2d Sess. (1978) at 102. (Emphasis supplied.)

This passage succinctly identifies the three categories on non-LNG imports and the pricing treatment accorded to each. All volumes equal to or below 1977 import levels are exempt from incremental pricing. The conference report states that the statute does not require incremental pricing of post-1977 imports specified in contracts entered into on or before May 1, 1978, but that the Secretary of Energy has discretion with regard to the pricing of those volumes. It is clear, therefore, that the statute requires volumes contracted for subsequent to May 1, 1978 to be incrementally priced if they exceed both 1977 deliveries and the maximum delivery obligations specified in contracts entered into on or before May 1, 1978. Furthermore, the final sentence of the passage from the conference report, underlined above, states in unambiguous language that section 207 does not apply to new--post May 1, 1978--imports, since those imports are covered in section 203. Section 203, as we have seen, establishes the general rule of incremental pricing for non-LNG imports.

Elsewhere, the conference report states the same conclusion:

Only certain portions of an interstate pipeline's acquisition cost of natural gas are subject to passthrough under this section [Sec. 203].

The conference agreement requires the following amounts to be subject to the passthrough requirements:

* * *

(2) That portion of the acquisition cost of--

(a) volumes of natural gas imports (other than LNG) in excess of both actual calendar year 1977 import volumes and contract volumes under a contract entered into on or before May 1, 1978, whichever is greater. . . . Id. at 97. (Emphasis supplied.)

Therefore both the legislative history and the language of the statute support the conclusion that import volumes in excess of both 1977 base levels and May 1, 1978 contract levels must be incrementally priced.6/

Having stated the legal basis for our decision, we are left only with the policy question of whether ERA should exercise its discretion under section 207(c)(2) to apply incremental pricing to import volumes in excess of 1977 levels but equal to or less than levels specified in May 1, 1978 contracts. We required incremental pricing of those volumes under our jurisdiction in Opinion and Order No. 14.7/ In the proceedings related to that Opinion, PGC and AISI raised the same objections to possible subsidization of electric utility users of natural gas at the expense of industrial users that they raise here. We addressed those objections in Opinion and Order No. 14B,8/ which reaffirmed our decision to price the volumes incrementally.

PGC and AISI have raised no new policy arguments in the present proceedings. Sufficient grounds have not been raised to reopen the issue in the present dockets. We note, however, that all aspects of natural gas pricing are being reviewed generally by the Department of Energy.

B. Vermont Gas

Vermont Gas first argues that ERA erred in Opinion and Order No. 29 in granting the petition to intervene filed by PGC and AISI in ERA Docket No. 81-20-NG, the docket in which Vermont Gas is the applicant. Vermont Gas contends that because PGA and AISI's petition did not state that Vermont Gas serves a member of either PGC or AISI, they lack standing to intervene in that docket.

Section 15(a) of the Natural Gas Act (15 U.S.C. Sec. 717n) and the Rules of Practice and Procedure (18 A.F.R. Sec. 1.8) provide ERA with broad discretion to allow interventions in its proceedings. Those provisions authorize ERA to grant intervention to any petitioner whose participation "may be in the public interest." Vermont Gas does not contend that granting PGC and AISI's intervention was not in the public interest. Neither does it allege an abuse of discretion nor cite any case law--and we are aware of none--that would limit a petitioner's ability to intervene to cases where it can show that it buys gas from the applicant. We conclude, therefore, that PGC and AISI were properly granted intervenor status.

Vermont Gas also contends that ERA erred in consolidating its case with the other dockets in Opinion and Order No. 29. It states that its position is unique in that it is an intrastate distribution system entirely dependent on Canadian imports. In view of these circumstances, Vermont Gas argues that it is unfair to consolidate its case with the other dockets in this proceeding.

As stated above, these dockets were consolidated in Opinion and Order

No. 29 for the purpose mf determining whether the new import price is in the public interest, a question common to all dockets. Vermont Gas does not object to the new price authorized by that Opinion. Rather, it appears to be concerned that additional issues could be resolved in these dockets contrary to its interests. That concern is unfounded. No additional issues will be addressed in these consolidated dockets. In particular, we note that we are today denying the application of PGC and AISI for rehearing of the incremental pricing issue. For these reasons, we conclude that these dockets were properly consolidated and that Vermont Gas will not be adversely affected.

Order

For the reasons stated above, it is ordered that, pursuant to Section 19 of the Natural Gas Act, the Applications for Rehearing of Opinion and Order No. 29 filed by the Process Gas Consumers Group/the American Iron and Steel Institute and Vermont Gas Systems, Inc. are hereby denied.

Issued in Washington, D.C. on June 11, 1981.

--Footnotes--

1/ DOE/ERA Opinion and Order No. 29, issued March 27, 1981 in ERA Docket Nos. 81-09-NG, et al., Pacific Gas Transmission Company, et al.

2/ Opinion and Order No. 29 authorized a twelfth company--Inter-City Minnesota Pipelines Ltd., Inc.--to import gas at a price not to exceed U.S. $3.95 per MMBtu (U.Q. $3.68 per GJ).

3/ DOE/ERA Opinion and Order No. 14, issued February 16, 1980 in ERA Docket Nos. 80-01-NG, et al., Inter-City Minnesota Pipelines Ltd., Inc., et al., 1 ERA Para. 70,502 Federal Energy Guidelines ("Order No. 14").

4/ The Federal Energy Regulatory Commission (Commission) recently reached the same conclusion regarding the price of new gas imports. In an order authorizing the importation of gas from Canada relating to the pre-build portion of the Eastern leg of the Alaska Natural Gas Transportation System, the Commission determined that because the original purchase contract for the volumes in question was executed on May 17, 1979, NGPA Section 207 requires incremental pricing. (Northwest Alaskan Pipeline Co., Docket Nos. CP78-123, et al., slip opinion at 9, April 24, 1981.)

5/ In circumstances where the 1977 levels are greater than the May 1, 1978 contract levels, volumes in excess of the May 1, 1978 contract levels but

less than the 1977 levels are exempt from incremental pricing.

6/ In their Application for Rehearing (p. 9, footnote 2) PGC and AISI state that ERA has taken the position in an unrelated case involving Algerian LNG imports (West Virginia Public Service Commission, et al. v. DOE/ERA, D.C. Cir. Nos. 84-1402, et al.) that pursuant to its authority under section 3 of the Natural Gas Act it could require incremental pricing for certain volumes that arguably were exempted from incremental pricing by the NGPA. They contend that position is inconsistent with the position taken in Opinion and Order No. 14 that imports in excess of both 1977 levels and May 1, 1978 contract levels must be incrementally priced and that ERA has no discretion to exempt those volumes. We did not intend to leave the impression in the West Virginia brief that we have authority under the Natural Gas Act to override affirmative NGPA pricing requirements, and we claim no such authority.

7/ 1 ERA Para. 70,502 Federal Energy Guidelines at 72,014-15.

8/ 1 ERA Para. 70,508 Federal Energy Guidelines.