

Cited as "1 ERA Para. 70,120"

Columbia LNG Corporation; Consolidated System LNG Company; Southern Energy Company (ERA Docket No. 79-14-LNG)

DOE/ERA Opinion and Order No. 11-A

Order Denying Refunds

I. Summary of Decision

The issue in this proceeding is whether, as the result of the reversal and remand of DOE/ERA Opinion and Order No. 11 (Order 11)^{1/} by the D.C. Circuit Court,^{2/} a refund of any monies paid for natural gas delivered pursuant to Order 11 is in the public interest. Order 11 allowed a change to a price adjustment provision of an import arrangement earlier authorized by the Federal Power Commission (FPC)^{3/} which resulted in an increase in the price for Algerian liquefied natural gas (LNG) imported by Columbia LNG Corp. (Columbia), Consolidated System LNG Co. (Consolidated), and Southern Energy Co. (Southern).

After a careful balancing of the equities, the conclusion has been reached that it is not in the public interest to award refunds.

II. Background

On May 18, 1979, a joint application was filed with the Economic Regulatory Administration (ERA) by Columbia, Consolidated, and Southern to amend their existing authorization to import LNG from Algeria. The application requested approval of an interim increase in the base price and a new adjustment formula for determining the future price of the LNG.

The applicants requested an increase in the base price, f.o.b. Arzew, Algeria, from \$0.39 to \$1.75 per MMBtu as of July 1, 1979 (providing for a "discount" of \$0.60 per MMBtu resulting in a base price of \$1.15), to be effective through December 31, 1979. On August 22, 1979, the agency in DOE/ERA Opinion and Order No. 7 (Order 7) approved the increase as proposed.^{4/} This decision was based upon the fact that the seller's ^{5/} costs had escalated well beyond the expectations of any of the project participants at the time the original agreement was approved, and thus, the project was no longer commercially sustainable without immediate price relief. Order 7 compared the estimated regasified price of the LNG with the prices of residual fuel oil as reported in Platt's Oilgram and DOE's Weekly Petroleum Status Report and found that the interim price would result in a regasified price lower than the price of residual fuel oil. Order 7 was not challenged on rehearing or in court.

The agency set for evidentiary hearing the applicants' other request that the base price adjustment provision be changed beginning January 1, 1980, to require automatic adjustments indexed to prices of No. 2 heating oil and No. 6 residual fuel oil. After the hearing, Order 11 was issued on December 29, 1979, approving the adjustment provision. Use of the new adjustor established a base price of \$1.96 per MMBtu, effective January 1, 1980. Order 11 found that the escalated price after regasification would be competitive with the most readily available alternative fuel (No. 6 residual fuel oil) and would help to restore the commercial viability of the project.

On January 28, 1980, the Public Service Commission of West Virginia (PSCWV), the General Motors Corp. (GM), the Georgia Industrial Gas Group (GIGG), and the Consumer Federation of America (CFA) filed applications for rehearing of Order 11. These were denied by operation of law.

In March 1980, Sonatrach advised the importers that the amended agreement authorized in Order 11 did not receive approval by the Algerian government. Instead, the Algerian government sought a new base price of approximately \$6.00 per MMBtu, an adjustment clause linking the price to world crude oil prices, and conformity of all contract adjustment clauses with those in other contracts with U. S. companies importing LNG from Sonatrach. Negotiations among the importers, Sonatrach, the U. S. government, and the Algerian government failed to resolve the price dispute. Deliveries of LNG from Algeria to the importers were suspended on March 31, 1980. The last delivery at Cove Point, Maryland, arrived on April 10, 1980.

PSCWV, GM/GIGG, CFA, and the Consumer Energy Council of America (CECA) petitioned the D.C. Circuit Court to review Order 11. The Court consolidated these cases and heard arguments on October 22, 1981.

On June 18, 1982, the D.C. Circuit Court found that the ERA Administrator's determination of a national need for the imported LNG was not supported by substantial record evidence, as required by the Natural Gas Act (NGA).^{6/} As a result, the Court vacated Order 11.^{7/} The Court remanded to the agency the issue of whether any monies paid for gas delivered between January and April 1980 should be refunded.^{8/}

On remand, the existing record was supplemented by written comments received on the refund issue pursuant to a procedural order issued on May 27, 1983.^{9/} All of the parties filed initial comments, and all but GM and GIGG filed reply comments. CFA and CECA in a joint filing, Public Service Commission of New York (PSCNY), and PSCWV argued for refunds; the three project sponsors (Columbia, Consolidated, and Southern) argued against refunds. The joint comments of GM and GIGG only addressed the disposition of refunds and thus are not discussed in this order, as refunds are not being awarded.

CFA and CECA in their joint filing made a motion to strike certain portions of the reply comments of Consolidated on the basis that the comments relied on certain non-public, extra-record events. Consolidated replied that the events referenced are in the case record or are matters of public knowledge. The agency has determined that there is ample evidence in the case record of U.S. government involvement in the negotiations with Sonatrach; furthermore, U.S. government interest in the LNG project is well-documented in the public press. Therefore, the motion of CFA/CECA is denied.

This is a case of first impression. There has not been a previous administrative decision on the award of refunds from an international gas transaction authorized under Section 3 of the NGA. Thus, in determining whether the award of refunds is in the public interest under Section 3, the agency reviewed analogous cases involving domestic gas supplies. The principles applied in those cases would be appropriate in this case. The principles have also been supported in decisions regarding refunds by other administrative agencies. Those principles are, first, that the Administrator has broad discretion, in the first instance, to determine whether refunds are in the public interest; and, second, that in exercising this discretion, the Administrator should balance the equities in the case on both sides of the question.^{10/}

III. Decision

In exercising the discretion provided the Administrator in this case, the equities have been balanced through careful analysis of the facts on both sides of the issue.

In essence, the parties asking for refunds have urged the ordering of refunds because Order 11 was declared invalid and, therefore, the higher price authorized by the order was unreasonable. They also asserted that the invalidity of the order demonstrated that the consumers did not benefit because the Court found that there was no demonstrated need for the gas. It is on the basis of this reasoning that these parties believe refunds are required of monies collected pursuant to Order 11 in excess of the \$0.37 per MMBtu authorized by Opinion 622-A.

However, this agency does not agree that the requirement for refunds automatically flows from the Court's invalidation of Order 11.^{11/} The invalidation of the order is but one consideration in weighing these equities. Nor is it agreed that the invalidation of the order by itself is determinative of the reasonableness of the price paid for gas or of the benefit accruing to the consumers under Order 11.

The record in this case demonstrates that the price of the LNG in this project was less than the price of other, concurrent imports of natural

gas.^{12/} Order 11 projected that the authorized increase in the f.o.b. price would result in a total price of \$3.43 per MMBtu for the regasified LNG.^{13/} Thus, the price authorized in Order 11 compared favorably with the prices of other supplies of imported natural gas.

Further, with regard to alternative fuels, the record shows that the regasified price of this import also compared favorably with the prices of No. 2 distillate fuel oil and No. 6 residual fuel oil.^{14/} The price authorized in Order 11 was less than the price of No. 2 distillate fuel oil and within the competitive range of the price of No. 6 residual fuel oil.

The regasified price of this LNG was only marginally more than the prices of Section 102 gas and Section 103 gas ("new natural gas" under the Natural Gas Policy Act of 1978)^{15/} with normal transportation costs in the Appalachian area.^{16/} However, gas supplies from these categories were not available in comparable quantities nor for a term as long as that of the LNG project.^{17/} The ERA finds that the price the consumers paid for the gas under Order 11 was reasonable.

The agency also finds that while the Court determined that there was not substantial record evidence at the time Order 11 was issued to support the need for this LNG project over the term of the contract, the consumers did benefit in the short term. They purchased this additional gas supply at a reasonable price and used this supply during the winter heating season (January-April 1980). Had consumers not received this LNG, they would have had to purchase other fuel supplies. Given ample opportunity by the procedural order, the parties seeking refunds did not demonstrate that they could have obtained alternative fuel supplies during this period at lower prices. Further, no party requested additional proceedings.

The parties seeking refunds also asserted that the importers unfairly benefited from the continuation of the import from January to April 1980, because the importers received a return of and on equity nearly four months longer than would have been possible had deliveries stopped at the end of 1979 and triggered the minimum bill provisions contained in contracts with customers. Further, these parties contended that the importers assumed the risk of having to make refunds by accepting deliveries prior to official Algerian government approval of the contract amendments and by acting while Order 11 was still subject to judicial review.

The importers, on the other hand, argued that they did not receive any benefit from the increased f.o.b. price because it was paid directly to Sonatrach and cannot be recaptured. They pointed out that Order 11 did not authorize increases in their shipping or regasification and terminal costs.

Although the importers did benefit by receiving a return of and on

equity between January and April 1980, these were reasonable returns from a commercial investment which provided a product at a reasonable price. The importers properly relied in good faith on an authorization presumed valid.^{18/} While there was a risk that Order 11 could be overturned on review or that the Algerian government would not approve the contract amendments, it would be unreasonable to suggest with the benefit of hindsight that the importers should have delayed acting under the order until there was an end to these uncertainties. This would have been inappropriate in view of the circumstances at the time.

U.S. government approvals and licenses are always subject to review and appeal. Gas purchase arrangements would be jeopardized if precluded from operating under valid government authorizations while all avenues of appeal are being exhausted. Commercial arrangements that involve foreign government approval are at additional risk that such approval may not be forthcoming. Further, there can be broader trade or international policy reasons why proceeding with such arrangements is in the best interest of the U.S. commercial party and the United States. That is the situation that faced the importers upon the issuance of Order 11. At that time, nonpayment of the f.o.b. price approved by Order 11 to Sonatrach would have threatened the long-term viability of the project and the international trade relationship between the United States and Algeria. Therefore, the importers did not act unreasonably under the circumstances in paying the higher approved price.

It is also relevant that the ordering of refunds could not restore the parties to the same position had Order 11 not been issued. This agency has no jurisdiction over Sonatrach, the foreign supplier that received the monies attributable to the higher f.o.b. price under Order 11. An order by this agency to pay refunds would not reach Sonatrach, and it is unlikely that the importers could recover the refunded amounts from Sonatrach on their own. Furthermore, the parties who would ultimately receive the refunds--the consumers--benefited from the use of a reasonably priced fuel supply.

In conclusion, after a careful balancing of the facts and equities in this case, as evidenced by the record, it is determined that the public interest would not be served by an award of refunds. The consumers benefited from the use of this LNG supply, for which they paid a reasonable price during a winter heating season. Had this LNG not been supplied, the consumers would have used an alternative fuel supply, which was not available at a significantly lower price. It would be inequitable now to penalize the importers who acted in good faith and in reliance upon a presumptively valid administrative order.

Order

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

A. Refunds are not in the public interest; and

B. The motion to strike filed by CFA/CECA is denied.

Issued in Washington, D.C., May 29, 1984.

--Footnotes--

1/ 1 ERA Para. 70,110, Federal Energy Guidelines (ERA Docket No. 79-14-LNG, December 29, 1979).

2/ West Virginia Public Service Commission v. U.S. Department of Energy, Economic Regulatory Administration, 681 F.2d 847 (D.C. Cir. 1982).

3/ Columbia LNG Corporation, et al., Opinion No. 622, 47 FPC 1624 (1972), as modified in Opinion No. 622-A, 48 FPC 723 (1972), remanded in part in Columbia LNG Corporation v. FPC, 491 F.2d 651 (5th Cir. 1974) and reissued in Opinion No. 786, Columbia LNG Corporation, 57 FPC 354 (1977). The import authorizations granted in Opinion No. 622 were subsequently amended by FPC order, issued July 27, 1977 (in FPC Docket Nos. CP71-68, CP71-151, CP71-153), and by ERA orders issued May 8, 1979 (ERA Docket No. 78-007-LNG, unnumbered) and August 22, 1979 (ERA Docket No. 79-14-LNG, DOE/ERA Opinion and Order No. 7).

4/ 1 ERA Para. 70,107, Federal Energy Guidelines (ERA Docket No. 79-14-LNG, August 22, 1979). The original authorized price was \$0.305. With the escalator, it was \$0.378 in May 1979 and \$0.39 in July 1979 when Order 7 took effect.

5/ The seller was Sonatrach--the acronym for Algeria's state-owned oil and gas company, Societe Nationale pour la Recherche, la Production, le Transport, et la Commercialization des Hydrocarbures.

6/ Sec. 19(b), 15 U.S.C. Sec. 717r(b).

7/ West Virginia Public Service Commission v. U.S. Department of Energy, Economic Regulatory Administration, 681 F.2d at 867.

8/ The ERA Administrator is authorized by Section 3 to issue a supplemental order ordering refunds, if necessary or appropriate to make the operation of this LNG import project consistent with the public interest. See *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1065 (D.C. Cir.) cert. denied, 419 U.S. 834 (1974).

9/ The parties seeking refunds have sought to expand the applicable period for refunds beyond the January through April 1980 period to July 1979

through December 1980. Since a determination has been made not to award refunds, it is not necessary to deal with the appropriate period for which refunds would be applicable. Parenthetically, the Court held, "The only question awaiting resolution [involves] . . . gas delivered between January and April 1980." That is the appropriate period that would be at issue. Further, the period from July 1979 through December 1979 is covered by Order 7 which was not challenged in court and is a final order. The period from mid-April through December 1980 follows the end of deliveries in this project, and no further gas flowed nor did the consumers pay for additional gas.

10/ See *Consumer Federation of America v. FPC*, 515 F.2d 347, 359 (D.C. Cir. 1975) cert. denied, 423 U.S. 906 (1975); *Las Cruces TV Cable v. FCC*, 645 F.2d 1041, 1047 (D.C. Cir. 1981).

11/ The Court's remand of the issue by its very nature of asking "whether or not" implies that refunds are not automatic. *West Virginia Public Service Commission v. U.S. Department of Energy, Economic Regulatory Administration*, 681 F.2d at 867.

12/ The average regasified price for this import of LNG from Algeria was \$3.14 per MMBtu in 1980. In the same year, the average regasified price of Algerian LNG imported by Distrigas Corp. was \$4.05 per MMBtu. [U.S. Imports and Exports of Natural Gas 1980. DOE/EIA-0188(80), at 13.] On the same day Order 11 was issued, the ERA authorized a border price of \$3.625 per MMBtu for natural gas from Mexico. [Border Gas, Inc., DOE/ERA Opinion and Order 12, 1 ERA Para. 70,501 (December 29, 1979).] In March 1980, the ERA approved a price increase for Mexican natural gas to \$4.47 per MMBtu. [Border Gas, Inc., DOE/ERA Opinion and Order No. 16, 1 ERA Para. 70,510 (March 27, 1980).] In November 1979 the border price for Canadian natural gas was \$3.45 per MMBtu. This increased to \$4.47 per MMBtu in February 1980. [Inter-City Minnesota Pipelines Ltd., Inc., et al., DOE/ERA Opinion and Order No. 14, 1 ERA Para. 70,502 (February 16, 1980).]

13/ 1 ERA Para. 70,110, Federal Energy Guidelines, at 70,661.

14/ Exhibit SNG-19, Schedule 2. Exhibit accompanying prepared direct testimony of Radford L. Schantz, of Foster Associates, Inc., relating to the marketability of Algerian LNG imported by Columbia, Consolidated, and Southern.

The representative East Coast fuel oil prices in September/October 1979 were:

No. 2 Distillate Fuel Oil--\$4.88 per MMBtu

No. 6 Residual Fuel Oil (0.3% sulfur)--\$3.85-4.12 per MMBtu

No. 4 Residual Fuel Oil (1.0% sulfur)--\$3.46-3.63 per MMBtu

No. 6 Residual Fuel Oil (1.5% sulfur)--\$3.46-3.63 per MMBtu

At Schedules 8-9. A survey of retail energy prices in eight cities served by this project found price ranges as follows:

Distillate Fuel Oil in the Residential Sector--\$5.44-5.99 per MMBtu

Distillate Fuel Oil in the Commercial Sector--\$5.27-5.61 per MMBtu

Distillate Fuel Oil in the Industrial Sector--\$4.92-5.03 per MMBtu

Residual Fuel Oil in the Industrial Sector--\$3.13-3.77 per MMBtu

These represent retail energy prices in the residential and commercial sector as of September 1979. (The cities surveyed were Atlanta, Birmingham, Charleston, Albany, Cleveland, Pittsburgh, Columbus, and Baltimore.)

15/ 15 U.S.C. 3301 et seq.

16/ Testimony of William H. Howard (Senior Vice President of Columbia Gas Transmission Corporation) on cross-examination, Tr. vol. 4, at 123.

17/ Id. (According to Mr. Howard, Columbia's share of the Algerian LNG was 304 Mcf per day and a typical Appalachian well could produce "60,000 feet per day, ultimate reserves of maybe 175,000 Mcf.")

18/ See Panhandle Eastern Pipe Line Co. v. FPC, 179 F.2d 896, 902 (8th Cir. 1949).