Cited as "1 ERA Para. 70,604"

Northwest Pipeline Corporation (ERA Docket No. 85-12-NG), September 10, 1985.

DOE/ERA Opinion and Order No. 87

Order Approving an Amendment to an Authorization to Import Natural Gas from Canada

I. Background

On May 10, 1985, Northwest Pipeline Corporation (Northwest) filed an application with the Economic Regulatory Administration (ERA) of the Department of Energy (DOE), pursuant to Section 3 of the Natural Gas Act (NGA) and section 590.201 of the ERA's administrative procedures, to amend its authorization to import Canadian natural gas in accordance with an October 1, 1984, letter of agreement that Northwest signed with its Canadian supplier, Westcoast Transmission Company Limited (Westcoast). The agreement went into effect November 1, 1984, and will expire October 31, 1985.

The agreement establishes a two-part, demand-commodity pricing structure that results in an average unit rate of $3.40 per MMBtu, based upon sales projections at a 33 percent load factor. The demand charge is $6 million per month and the initial commodity charge was $2.78 per MMBtu. The commodity charge is subject to quarterly adjustment, based upon the price of No. 6 fuel oil in the Seattle-Portland area, and as mf July 1, 1985, was reduced to $2.51 per MMBtu. The agreement requires that Northwest purchase a minimum annual volume of 42.5 percent of Northwest's actual sales up to 262 Bcf, plus 75 percent of Northwest's actual sales over 262 Bcf.

Northwest filed a report of contract amendments with the ERA on October 4, 1984, in accordance with the requirements of section 590.407 of the ERA's administrative procedures. Because the agreement did not extend the term of the original authorization, increase the volume, or increase the authorized price, no approval was required from the ERA.

Northwest is currently authorized to import gas from Westcoast pursuant to DOE/ERA Opinion and Order No. 38 issued December 21, 1981, in Docket No. 81-31-NG.1/ This authorization sets an upper limit of $4.94 per MMBtu on the price that can be paid for the gas and allows Northwest to import up to 286 Bcf per year from Westcoast.

Northwest applied to the Federal Energy Regulatory Commission (FERC) to amend its purchased gas adjustment to track in its rates any future changes in the Westcoast demand and commodity charges. The FERC set the matter for hearing in an October 31, 1984, order.2/ In response to concerns raised by customers mf Northwest about the competitive effects of the "as billed" methodology of the Northwest proposal, the FERC broadened its proceeding on April 30, 1985, to consider the prudence of the Northwest/Westcoast agreement.

Because Northwest felt that the claims regarding the prudency of the agreement go to the heart of whether the imports under the agreement meet the public interest standard, which Northwest contended was a determination outside the scope of FERC jurisdiction and should be determined by the ERA, it initiated this proceeding before the ERA. Specifically, Northwest requested that the ERA "issue an order finding that the Westcoast Agreement, covering the 1984-85 contract year, including the two-part rate structure and the reduced average unit price, to be not inconsistent with the public interest and, in all respects, in conformance with the DOE Guidelines respecting the importation of natural gas."3/

II. Procedural History

A notice of Northwest's application was issued on May 22, 1985.4/ The notice invited protests and motions to intervene which were to be filed by July 5, 1985. Motions to intervene were filed by Cascade Natural Gas Corporation (Cascade), Colorado Interstate Gas Company (CIG), C.P. National Corporation (CPN), Intermountain Gas Company (Intermountain), Mountain Fuel Resources, Inc. (Mountain Fuel), Northwest Industrial Gas Users (NWIGU), Northwest Natural Gas Company (NNG), Southwest Gas Corporation (Southwest), Washington Natural Gas Company (Washington Natural), and Westcoast. In addition, the Public Utility Commissioner of Oregon filed a notice of intervention.

All intervenors except the Public Utility Commissioner of Oregon filed comments on the application. All commenters supported the application except CIG, Mountain Fuel, and Southwest, who protested the application. Southwest also requested the ERA to convene a conference to address the uncertainties that surround the scope of this case, particularly in regard to the scope of ERA and FERC jurisdiction.

On July 5, 1985, Northwest filed comments in support of its application and in answer to the protests of CIG and Mountain Fuel. On July 19, 1985, Northwest filed comments in answer to Southwest's protest and request for a conference. Northwest stated that there was no need for a conference in this

proceeding and that there was no need for the ERA to address the issue of the FERC's jurisdiction. On July 22, 1985, Intermountain and Westcoast filed similar objections to Southwest's request for a conference.

On July 24, 1985, the ERA issued an order granting all interventions and convening a conference to address the concerns of the intervenors. On August 13, 1985, the ERA issued an order rescheduling the conference for August 28, 1985, in response to a motion from Northwest with no objections from any party.

The conference was held on August 28, 1985. All parties except CPN and the Public Utility Commissioner of Oregon participated. No new issues were raised at the conference.

III. Decision

Northwest's application has been reviewed to determine if it conforms with Section 3 mf the NGA. Under Section 3, an import is to be authorized unless there has been a finding that the import "will not be consistent with the public interest." 5/ In making this finding, the ERA Administrator is guided by the DOE statement of policy relating to the regulation of natural gas imports.6/ Under this policy, the competitiveness of an import arrangement in the markets served is the primary consideration for meeting the public interest test.

The policy guidelines treat renegotiations of existing import arrangements in a special and more favorable way than they treat new arrangements. To avoid undermining ongoing gas supply arrangements, the guidelines provide that renegotiated contracts such as the Northwest/Westcoast agreement will be presumed to be in the public interest if they represent an improvement over the previous arrangement. Specifically, the policy guidelines state:

> U.S. companies that import natural gas under arrangements that are not fully consistent with these policies and the provisions of Delegation Order No. 0204-111 are encouraged to negotiate changes to such arrangements to bring them into conformity with these policies and provisions. . . , To the extent that such amendments bring an import arrangement more into conformity with these guidelines, they will benefit from the presumption that they are in the public interest, and opposing parties will bear the burden to rebut the presumption.7/

The issue of competitiveness was raised in this proceeding. Two of Northwest's opponents argue that the average unit price of $3.40 per MMBtu is

not competitive in their markets. CIG maintains that "the proposed import is not sufficiently competitive" and that "Northwest did not consider its competitiveness with alternative fuels and natural gas in CIG's market area." 8/ Mountain Fuel alleges that "Northwest's gas--influenced substantially by the cost of the gas Northwest purchases from Westcoast--has become uneconomically high for Mountain Fuel in the recent past." 9/ Specifically Mountain Fuel states "that $3.40/MMBtu is not--and was not--competitive in the markets served by Mountain Fuel and CIG." 10/

In general all parties supporting the Northwest application stated that the arrangement is competitive and market responsive. The commodity price allows them to compete with No. 6 fuel oil to regain previously lost industrial load and to maintain their current industrial load. They believe that the two-part, demand-commodity pricing structure gives them the flexibility to be competitive in their market areas. CPN, Cascade, Intermountain, and NNG maintain that this competitive flexibility can only be utilized if Northwest is allowed to flow through the demand and commodity charges "as billed" by Westcoast.

Cascade states "[t]he $1.00 per MMBtu reduction in the contract price coupled with the two-part demand/commodity pricing structure has provided Northwest and its customers with a great deal of pricing flexibility which, in turn, has allowed those customers to implement rates for natural gas which are competitive with the price of alternative fuels." 11/ Intermountain finds that the agreement "results in pates for natural gas which are competitive in the markets served by Northwest, including those markets served by Intermountain." 12/ NWIGU observes that ". . , the competitiveness of the letter agreement's terms is even more striking when compared to the price terms that otherwise would govern. Without the letter agreement, NWP [Northwest] would pay Westcoast the uniform border price of $4.40 per MMBtu, subject to no adjustment for the price of oil nor any provision for renegotiation. A return to the $4.40 price could be disastrous for the NWP system." 13/ NNG states that "[t]he purchase of Canadian natural gas by Northwest under the October 1, 1984 Agreement has been extremely valuable to Northwest Natural in marketing natural gas." 14/

More directly at issue is the competitiveness and fairness of the two-part, demand-commodity pricing structure established by the agreement and the "as-billed" flow through provision of the contract. The opponents contend that splitting the former one-part, commodity charge for Canadian gas into a two-part, demand-commodity charge is unfair to them. This is because they have cheaper domestic gas available and FERC Order 380 15/ allows them to avoid paying the commodity charge for any gas they do not take. Thus, under a

one-part commodity rate they could avoid any commodity charge for the Westcoast gas not taken from Northwest. Their contracts with Northwest require that they pay a demand charge for the gas that Northwest is contractually obligated to supply them, even if they choose not to buy the gas. The two-part structure has resulted in higher demand charges than before since Northwest's demand charges to its customers include the as-billed pass through of Westcoast's demand charges.

One of the opponents, Mountain Fuel, stated in its written comments that it "has opposed in FERC Docket No. TA85-2-37 Northwest's proposal to flow through its $72 million Westcoast `demand' charge on an as-billed basis." 16/ Mountain Fuel also commented at the August 28 conference that ". . . the two-part billing rate that Northwest and Westcoast entered into completely ignored parts of Northwest's system." 17/

The supporters of the application unanimously urge that the ERA approve the two-part, demand-commodity pricing structure, to be passed through as billed from Westcoast. Since the supporters buy virtually all of their gas supply from Northwest, they would pay the full cost of the Westcoast gas whether it is passed through as a one-part, commodity charge or as a two-part, demand-commodity charge. However, the two-part rate allows them far greater flexibility in how they can pass the costs of the gas into their own rates and thus in how competitive they can be in their own markets.

Cascade commented "it should be emphasized . . . that most of the benefits of the letter agreement will be lost unless Northwest's rates are based on the as-billed flow through of Westcoast's two-part rate." 18/ CPN states "the two part rate is critical, because, when flowed through to Northwest's customers `as-billed', it substantially reduces the Northwest ODL-1 commodity charge." 19/ Intermountain anticipates that ". . . as a result of the two-part, demand-commodity structure and the as-billed flow-through of the Westcoast gas costs, Intermountain will recapture substantial load which will result in an overall decrease of approximately $4.4 million in Intermountain's rates annually." 20/

Intermountain also stated that "the as-billed principle . . . is an integral part of this agreement." 21/ NNG stated that "flowing through the demand and commodity charges in the October 1, 1984 Agreement to Northwest's customers in accordance with the express intent of the parties to that agreement provides increased flexibility to Northwest's local distribution company customers in structuring rates in order to retain and regain markets." 22/

Washington Natural commented on the as-billed flow through and the alternative suggestion of the opponents in the FERC proceeding by saying that "[o]pponents of the `as-billed' treatment of the Westcoast demand and commodity charges in Northwest's rates contend that both charges should be flowed through in the commodity component of Northwest's rates. This result would completely destroy the flexibility and competitiveness afforded by the lower wholesale commodity rates resulting frmm the `as-billed' treatment." 23/

Northwest stated at the conference that:

> [t]he two-part rate structure is an integral part of the 10/1/84 letter agreement . . . and a negotiation concerning a long-term agreement continues to be based on the assumption that two-part rates will be approved . . . . The Department of Energy has recently indicated, in its comments filed in the FERC notice of proposed rulemaking at Docket Number RM-85-1 that two-part rate structures for the importation of Canadian gas are "consistent with U.S. import policy." I feel it is appropriate that the ERA expressly confirm this most recent policy objective of the Department of Energy has been met by this contract. This, in turn, will provide the parties with future guidance in their negotiations.24/

The ERA finds that the two-part, demand-commodity pricing structure, with the gas costs passed through on that basis, is reasonable and consistent with the public interest. As noted by Northwest, the most recent policy guidance from the Secretary of Energy on appropriate rates for Canadian gas is stated in the Department of Energy comments to the FERC Notice of Proposed Rulemaking.

> There should be no regulatory distinction between the treatment of domestic and imported gas supplies. A rate structure that properly allocates costs, such as the recent two-part tariffs for Canadian imports, promotes efficient gas use. These tariffs are also consistent with U.S. gas import policy. DOE strongly endorses the Commission's proposal to pass these charges through to consumers in the same form in which they are billed.25/

Furthermore, the ERA finds that the Northwest amendment provides natural gas that is more competitive in the markets served by Northwest than under previous arrangement. While it is true that two of Northwest's customers feel that the gas provided under the agreement is not competitive, a significant majority of its customers do find the gas competitive in their market areas. That the gas is more competitive, and thus more in conformity with the DOE guidelines than the previous arrangement, is a determination with which even

Southwest, a party that does not support the Northwest application, agrees. As Southwest states, "[i]t would hardly be in the interest of any customers of Northwest, including those which have questioned the prudence of the Westcoast Agreement, to prevent the importation of gas costing $3.40 per MMBtu where the alternative is the importation of gas costing $4.40 per MMBtu (the uniform border price) or $4.94 per MMBtu (the upper limit on Northwest's existing ERA import authorization)."26/

The protesters questioned the need for the volumes provided for in the arrangement. They contended that Northwest did not take into account the reduced gas needs of some of its customers when it negotiated the arrangement. CIG alleges that "the need for the volume of import requested is overstated"27/ and that Northwest "did not take into account severely reduced actual demand from CIG and other customers when assenting to the proposed import volume of approximately 115 Bcf per year."28/ Mountain Fuel believes that "Northwest imprudently entered into the October 1 amendment by ignoring the changed contract-demand needs of some of its customers and by committing to purchase a quantity of gas from Westcoast that did not reflect the aggregate expectations for actual marketability of its gas for those customers."29/

The supporters of the Northwest application hold that there is need for the gas volumes provided for in the agreement. Intermountain states "upon review of the design and historical perspective surrounding the origin of the Northwest system, it is readily apparent that Northwest has a need for the natural gas supply from Canada."30/ NNG finds that "the level of purchases expected under the October 1, 1984 Agreement is also comparable to the amount of natural gas which Northwest purchased from Westcoast during the 1983-1984 contract year. Therefore, the amount of natural gas Northwest has committed to purchase from Westcoast is entirely reasonable and related to the total market of Northwest and its customers.31/

The question of need for an import is a function of competitiveness.32/ Considering the arrangement in its entirety, the amended agreement has been found to be more competitive than the previous one. The ERA believes that Northwest was justified in acquiring sufficient volumes of gas to meet the aggregate needs of its customers, as reflected in the contracts they have signed with Northwest. Indeed, Northwest is obliged to meet these customer contract demands. While partial requirements customers may choose to buy less gas than contracted for, Northwest must be able to supply the total contracted amount on call. Since the volumes provided for in this agreement are comparable to those purchased by Northwest in the prior contract year, when the prices were higher, they are not unreasonable. The appropriate recourse

for those customers experiencing problems with their contracted volumes is to negotiate changes to their contracts with Northwest. The solution should be reached by the commercial parties and not imposed by the government in a regulatory proceeding.

The October 1, 1984, letter of agreement, with all of its terms and conditions, is an improvement over the previous arrangement and comports with the public interest test established in Section 3 of the NGA and interpreted in DOE's policy guidelines, and with recent DOE policy statements. The agreement allows Canadian natural gas to meet the system needs of Northwest. The two-part, demand-commodity pricing structure, when flowed through on an as-billed basis as provided for in the agreement, allows Northwest and its customers to sell gas in their markets at prices that are more competitive with alternative fuels than under the previous arrangement. The quarterly adjustment of the commodity charge, as well as the provision for renegotiation at any time, provides the flexibility necessary to respond to market changes. The alternative to approval of this amendment would be a price of $4.40 per MMBtu (Volume Related Incentive Price) and higher take-or-pay obligations, burdens borne by all of Northwest's customers.

Although the opponents have raised legitimate concerns representative of their interests, the ERA finds that, taken in its entirety, this amended agreement clearly brings the Northwest/Westcoast arrangements more into conformity with DOE guidelines. As stated in the DOE policy guidelines, renegotiated amendments to existing contracts for flowing gas are presumed to be in the public interest if they represent more competitive and market responsive arrangements than before. Opponents bear the burden of rebutting this presumption. The parties in this proceeding who oppose the application have failed to demonstrate that this amendment is not more competitive than the previous arrangement.33/

An additional concern raised by both the opponents and supporters of the application, as well as by Northwest, has been the relationship between the import authority of the ERA and the FERC under the NGA. The issue arises from questions about the impact of the parallel FERC proceeding on this authorization and the international contract.

The Administrator of the ERA is delegated the sole authority to authorize imports under the NGA. That authority was delegated by the Secretary of Energy under the Department of Energy Organization Act.34/ In Delegation Order No. 0204-111, the Administrator is delegated the authority under Section 3 of the NGA to regulate imports of natural gas based upon a consideration of such matters as the Administrator finds to be appropriate, and further, that

in exercising that authority, the Administrator may attach such terms and conditions as he may determine to be appropriate.35/ In Delegation Order No. 0204-112 to the FERC, the Secretary of Energy states that, with respect to the regulation of imports, the FERC has authority to "issue orders, authorizations, and certificates which the FERC determines to be necessary or appropriate to implement the determinations made by the Administrator."36/ The policy guidelines, in addressing the regulation of imports, state that in FERC regulatory decisions on gas supply authorized by the ERA for importation, the FERC will act consistently with the determinations made by the Administrator's authorization.37/

The United States Court of Appeals for the District of Columbia Circuit confirmed this relationship in a recent opinion which stated:

> [p]ursuant to the section 3 power delegated to it by the Secretary, the Commission is empowered to exercise its section 4 and 5 powers over imported gas. The only limit placed upon this authority is that the Commission cannot, consistent with the Delegation Orders, take actions inconsistent with the terms, conditions, or policy considerations reflected in the ERA's section 3 import authorization.38/

Therefore, it is clear from the above that only the ERA Administrator may review international contracts and authorize imports. Once the Administrator has approved an import arrangement, the FERC, while exercising its Section 4 and 5 authorities, cannot act in a manner inconsistent with the actions taken by the Administrator. Thus, it could not significantly alter or overturn the arrangements upon which the Administrator's actions are based.

In sum, after taking into consideration all of the information in the record of this proceeding, I find that the authorization requested by Northwest is not inconsistent with the public interest and should be granted.39/

Order

For the reasons set forth above, pursuant to Section 3 of the Natural Gas Act, it is ordered that:

A. The import authorization previously granted to Northwest Pipeline Corporation (Northwest) by FOE/ERA Opinion and Order No. 18 issued December 21, 1981, in ERC Docket No. 81-31-NG is hereby amended for a one-year term, from November 1, 1984, to October 31, 1985, to allow Northwest to import Canadian natural gas in accordance with the provisions of the October 1, 1984,

letter of agreement between Northwest and its Canadian supplier Westcoast Transmission Company Limited submitted as a part of the application filed by Northwest on May 10, 1985, including provisions relating to 1) price; 2) the demand/commodity pricing structure; and 3) the as-billed pass through.

B. Northwest shall file with the ERA, for all gas imported under this authorization, in the month following each calendar quarter, quarterly reports showing by month, the quantities of natural gas imported under this authorization, and the price paid for those volumes. The price data shall show both the demand and commodity charge paid.

Issued in Washington, D.C., September 10, 1985.

--Footnotes--

1/ ERA Para. 70,537.

2/ FERC Docket No. TA85-2-37-00, et al, 29 FERC Para. 61,149 at 61,323.

3/ Application of Northwest Pipeline Corporation for an Order Determining That a Gas Import Contract Is Not Inconsistent with Public Interest and Conforms to Policy Guidelines of Department of Energy, May 10, 1985, at 17.

4/ 50 FR 23495, June 4, 1985.

5/ 15 U.S.C. Sec. 717(b).

6/ 49 FR 6684, February 22, 1984.

7/ Id. at 6689.

8/ Motion of Colorado Interstate Gas Company to Intervene and Protest, June 20, 1985, at 5-6.

9/ Protest and Motion to Intervene of Mountain Fuel Resources, Inc., June 28, 1985, at 2.

10/ Id. at 7.

11/ Petition of Cascade Natural Gas Corporation for Leave to Intervene and Comments on Application, July 5, 1985, at 4.

12/ Motion to Intervene of Intermountain Gas Company, July 3, 1985, at 5.

13/ Motion of the Northwest Industrial Gas Users to Intervene, July 3, 1985, at 5.

14/ Motion of Northwest Natural Gas Company to Intervene and Statement of Position in Support of Northwest Pipeline Corporation's Application, July 8, 1985, at 13.

15/ Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, Order No. 380, 27 FERC Para. 61,318.

16/ See supra note 9, at 2.

17/ Transcript of the August 28, 1985, conference held in the matter of Northwest Pipeline Corporation, Docket Number 85-12-NG, August 30, 1985, at 30.

18/ See supra note 11, at 6.

19/ CP National Corporation's Motion to Intervene and Comments Supporting Northwest's Application, July 5, 1987 at 4-5.

20/ See supra note 12, at 13.

21/ See supra note 17, at 23.

22/ See supra note 14. at 11-12.

23/ Motion of Washington Natural Gas Company to Intervene in Support of Application of Northwest Pipeline Corporation, July 5, 1985, at 9.

24/ See supra note 17, at 46-47.

25/ Comment of the United States Department of Energy, FERC Docket No. RM 85-1-000 (Parts A--D), July 15, 1985, at 45-46.

26/ Motion for Intervention, Motion for Conference and Comments of Southwest Gas Corporation, July 5, 1985, at 9.

27/ See supra note 8, at 5.

28/ Id. at 6.

29/ See supra note 9, at 6.

30/ See supra note 12, at 13.

31/ See supra note 14, at 7.

32/ See supra note 6, at 6687.

33/ While the ERA finds that the renegotiated agreement is an improvement over the previous one, the parties, including the suppliers, could go further in making the arrangement more competitive and market responsive. It is hoped that the concerns of all customers, some of which have been expressed in this proceeding, can be accommodated.

34/ 1 ERA Para. 10,300.

35/ 1 ERA Para. 70,032.

36/ 1 ERA Para. 70,033.

37/ See supra note 6, at 6689.

38/ Wisconsin Gas Co. v. Federal Energy Regulatory Commission, No. 84-1358, Slip op. at 32-33 (D.C. Cir. Aug. 20, 1985).

39/ The DOE has determined that because existing pipeline facilities will be used and no new construction is being undertaken for this import, granting this application clearly is not a Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act (42 U.S.C. 6321, et seq.) and therefore an environmental impact statement environmental assessment is not required.