Cited as "1 ERA Para. 70,609"

Northwest Pipeline Corporation (ERA Docket No. 85-12-NG), November 8, 1985.

FOE/ERA Opinion and Order No. 87A

Order Denying Rehearing

I. Background

On September 10, 1985, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 87 (Order No. 87) in ERA Docket No. 85-12-NG.1/ Order Lo. 87 approves a one-year amendment to Northwest Pipeline Corporation's (Northwest) existing authorizations to import Canadian natural gas from Westcoast Transmission Company Limited (Westcoast) and would have the effect of lowering the price of Canadian gas to U.S. consumers on Northwest's system. Disapproval of the amendment would have resulted in reversion of the price from $3.40 to $4.40 per MMBtu.2/

II. Applications for Rehearing

On October 10, 1985, the Colorado Interstate Gas Company (CIG), Mountain Fuel Resources, Inc. (Mountain Fuel), and Southwest Gas Corporation (Southwest) filed applications for rehearing of Order No. 87. These three distributor customers together purchase 14 percent of Northwest's gas. CIG and Mountain Fuel purchase seven percent.

CIG argues that the ERA erred in not conducting a trial-type hearing. CIG also asks the ERA to amend or clarify Order No. 87 so that there is no confusion as to its scope and applicability to ongoing proceedings at the Federal Energy Regulatory Commission (FERC). In the alternative, CIG asks the ERA to withdraw Order No. 87, since CIG contends it is only an "advisory opinion" and should not have been issued as an order.

Mountain Fuel asks the ERA to disclaim jurisdiction over the as-billed flow-through provision of Northwest's amendment and over the issue of Northwest's prudency in entering into the amendment in the context of Northwest's obligations under Sections 4 and 5 of the Natural Gas Act (NGA). Mountain Fuel also asks the ERA to convene a trial-type hearing, or in the alternative, to withdraw Order No. 87 except to the extent necessary to allow Northwest to continue to import gas under its previous arrangement.

Southwest's application asks the ERA to vacate the portion of Order No. 87 that approves the as-billed flow-through provision of Northwest's amendment and, if the ERA issues an order finding the Northwest arrangement meets the DOE guidelines, it explain the jurisdictional significance in view of the ongoing FERC inquiry into the prudence of the arrangement.

On October 25, Northwest filed a motion to strike the attachment of the direct testimony of Mr. Lowell F. Gill in a related FERC proceeding and an affidavit adopting such testimony in the ERA proceeding from the application for rehearing filed by Mountain Fuel on the grounds that Mountain Fuel improperly attempted to reopen the record and inject further evidence into the proceeding in its rehearing request.

III. Decision

The applicants for rehearing raise three issues as grounds for their rehearing requests. They question, first, whether the procedures that the ERA followed in issuing Order No. 87 provided due process; second, whether the ERA had sufficient evidence in the record to issue the order; and third, whether the ERA exceeded its jurisdiction in approving the as-billed flow-through provision of Northwest's amendment.

A. Procedural Arguments

CIG claims the ERA erred in issuing Order No. 87 without conducting a trial-type hearing where CIG could present evidence under oath and could cross-examine other witnesses presenting testimony.3/ Mountain Fuel states it expected the ERA to set the issues in the proceeding for hearing, and states that no opportunity was provided where evidence presented in the proceeding could be cross-examined. Mountain Fuel requests the ERA to convene a trial-type hearing.

The ERA, in the notice of the application published in the Federal Register, provided parties seeking intervention the opportunity to request additional procedures, including a trial-type hearing, and described the procedures set forth in its administrative procedures at 10 CFR Part 590 for requesting additional procedures.4/ Specifically, the ERA stated, "[a] party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or a trial-type hearing. . . , Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts." 5/ Neither CIG nor Mountain Fuel requested any

additional procedures, nor did they specifically request the ERA to hold a trial-type hearing, nor demonstrate the need for such a hearing as required by the ERA's administrative procedures and the Federal Register notice of the application. Only Southwest requested additional procedures--a conference--and that was held on August 28, 1985.

At the conference, CIG contended "the legal standards clearly establish that the ERA can't issue an order under section three . . . [without] conducting a hearing." 6/ Further, CIG alleged there existed "the need for the ERA to conduct the same type of probing inquiry that the FERC did." 7/ These are legal conclusions (which, if they imply that the ERA is required to hold trial-type hearings in all cases, happen to be incorrect). They are not, nor could the ERA fairly construe them to be, a request for a trial-type hearing. Nor did CIG make such a request in its application. Nor did it make, at any time, the required showing that there are factual issues genuinely in dispute that are relevant and material to a decision or that a trial-type hearing would be necessary for a full and true disclosure of any such disputed facts.8/

CIG and Mountain Fuel allege there are certain disputed facts in this proceeding which they contend would require a trial-type hearing for full and true disclosure. Those facts concern whether the Northwest amendment results in gas prices which are competitive in their own market areas (CIG and Mountain Fuel both state the prices are not competitive), and whether CIG and Mountain Fuel need the volumes Northwest contracted for under the amendment (they contend Northwest did not take into account their reduced demand).

Neither fact is disputed by Northwest. It concedes there is more competitive gas available to the two systems 9/ and the amendment did lot take into account the desire of CIG and Mountain Fuel to reduce contract demand.10/ Therefore, neither CIG nor Mountain Fuel have made the demonstration required by Section 590.313 of the ERA's administrative procedures to justify the need for a trial-type hearing. For the purposes of consideration of this application the ERA accepted these facts as true, and concluded, therefore, that it is unnecessary to conduct a trial-type hearing to put undisputed facts to proof and debate. The ERA has not been otherwise persuaded and hereby denies Mountain Fuel's motion in its rehearing request for a trial-type hearing.

B. Substantial Evidence Arguments

CIG and Mountain Fuel allege the ERA did not base its findings in Order No. 87 on substantial evidence and ignored evidence that they provided which would support a different result. The ERA did not ignore the information filed

by CIG and Mountain Fuel. CIG and Mountain Fuel would have the ERA reach an anomalous result, giving greater weight to their concerns when such concerns, although legitimate, represent only seven percent of Northwest's sales. The ERA not only did not ignore their evidence, we considered it at length, as Order No. 87 makes clear. What the ERA did was reject CIG's and Mountain Fuel's arguments.11/ As discussed below in greater detail, we reaffirm our conclusion that the amended arrangement, as a whole, is not inconsistent with the public interest based on substantial evidence submitted by representatives of all the parties, including representatives of a significant majority of Northwest's market.

The ERA's responsibility under Section 3 of the NGA is to authorize an import unless the agency finds the import will not be consistent with the public interest. In making this finding, the ERA Administrator is guided by the DOE's statement of policy under which competitiveness in the markets served is the primary consideration for meeting the public interest test.12/ In addition, to avoid undermining ongoing gas supply arrangements, the policy guidelines accord special treatment to renegotiations of existing import arrangements. To the extent a renegotiated contract, such as Northwest's, results in a more competitive import arrangement, it is presumed to be in the public interest.13/ Opposing parties thus bear a greater burden of proof than if the application involved a new arrangement.

CIG and Mountain Fuel in their original comments contended that the amendment produced prices for the gas supply that were not competitive in their specific market areas, which, as noted before, constitute approximately seven percent of Northwest's system sales. They presented evidence about the price in their market areas and the impact of that price. The facts they presented were not disputed. However, they provided no evidence that the gas prices under the amendment are not competitive in Northwest's market area as c whole; nor did they attempt to show that the amendment as a whole was not more competitive than the previous Northwest arrangement.

All other parties in the proceeding,14/ except Southwest, the other protester, presented evidence that the gas prices under the amendment are competitive in their market areas. The customers supporting the Northwest arrangement represent the majority of Northwest's system sales. All of these parties and Southwest stated that the gas price under the amendment is lower than under the previous agreement and that the amended arrangement is therefore more competitive than the previous agreement.

The ERA weighed the evidence presented by both sides in the proceeding and found that, for the majority of Northwest's customers, the gas prices

under the amendment were more competitive than those provided by the previous arrangements. The ERA therefore found that the arrangement as a whole was more competitive and thus complied with the guidelines. Further, the ERA recognized that disapproval of the amendment would have caused the price to revert from $3.40 per MMBtu back to the Canadian Volume Related Incentive Price of $4.40.

CIG contends in its rehearing request that the ERA's finding on the as-billed flow-through provision mf the amendment is not supported by substantial evidence. CIG contended "that the let effect of the as-billed flow-through procedure is to have the PL-1 customers subsidize a cheaper cost mf gas for Northwest's distribution customers in the Pacific Northwest." 15/ However, the other parties in the case unanimously urged the ERA to approve the as-billed flow-through provision since it gave them greater flexibility in how they can pass through the costs of Northwest's gas into their own rates.16/ They contended the provision is critical to the amendment and stated that the benefits of the amendment could be lost without it.17/

Taking into account the strong evidence offered supporting the provision, the ERA found that the as-billed flow-through provision is not inconsistent with the public interest.

Finally, CIG challenged the ERA's finding of need. During the proceeding CIG contended that need for the volume of gas was overstated 18/ and Mountain Fuel alleged that Northwest did not take into account the reduced actual demand from CIG and other customers when it agreed to the volumes stated in the amendment.19/

Intermountain Gas Company and Northwest Natural Gas Company both stated that there was a need for the gas and that the amount of gas provided for in the amendment was reasonable and related to the total market of Northwest.20/

The ERA considered the evidence presented by the parties in light of the policy guidelines under which need is deemed to be a function of competitiveness. The ERA also considered Northwest's obligation to provide enough gas to meet its customers' contract demands, whether or not they choose to buy the gas Northwest makes available. Because the amendment taken in its entirety was found to be more competitive than the previous Northwest arrangement and because several customers provided sufficient evidence to show the volume of gas provided was reasonable, the ERA found that there is need for the gas.

Mountain Fuel attached to its application for rehearing a copy of direct

prepared testimony of Mr. Gill in the related FERC proceeding and an affidavit adopting that testimony in the ERA proceeding. Northwest moved that that portion of Mountain Fuel's application for rehearing be struck as procedurally improper.

The ERA agrees with Northwest. Mountain Fuel filed the document in question after the record had been closed. There was ample opportunity, in response to the Federal Register notice and at the conference, for Mountain Fuel to place this document as evidence in the record. They failed to do so. In addition, the document was not new evidence in the sense that the information did not arise after the final order was issued and the record closed (the testimony is dated March 1, 1985). Submission of such untimely evidence after the record is closed and a final order is issued is improper. Further, this evidence is duplicative of evidence already submitted into the record on issues already decided in Order No. 87. The impact of the Northwest amendment on Mountain Fuel's system is on the record as an undisputed fact which the ERA assumed to be true. Thus, substantively, as well as procedurally, Mountain Fuel's submission of Mr. Gill's testimony is inappropriate. Northwest's motion to strike is therefore granted.

In sum, in challenging the three findings on competitiveness, the as-billed flow-through provision, and need, CIG and Mountain Fuel repeatedly state that the findings are wrong because they have submitted evidence that shows that the findings do not apply to their individual systems. However, they do not demonstrate that the Northwest system as a whole will not benefit from the amendment. Nor do they show that the amendment is not more competitive than the previous Northwest arrangements for the Northwest system as a whole.

In Order No. 87, the ERA recognized that the opponents of Northwest's application had raised legitimate concerns representative of their interests. Order No. 87 also noted that, while the ERA found that the renegotiated agreement was an improvement over previous arrangements, the parties could go further in making the arrangement more competitive. Accordingly, the ERA expressed the hope that the concerns of all Northwest's customers could be accommodated in the arrangement presently being negotiated. The ERA urges Northwest and Westcoast to take these desires into account in their current negotiations for a competitive long-term import arrangement.

The ERA does not believe that its decision has harmed Mountain Fuel, CIG or Southwest, nor limited their options. Those parties can exercise their right to renegotiate their contracts with Northwest, seek relief in general rate proceedings before the FERC, or, if Northwest decides to operate as a

transporter, drop off the system and seek less expensive supplies from other sources as contemplated by the FERC in its rulemaking in Docket No. RM85-1-000.21/ The issues raised by CIG and Mountain Fuel concerning their contract demand levels are commercial issues outside of the scope mf this proceeding and are best resolved by negotiation among the parties.

C. Jurisdictional Arguments

CIG, Mountain Fuel, and Southwest all question the ERA's discussion of its responsibilities vis-a-vis the FERC's in Order No. 87. CIG feels the ERA encroached on the authority and matters vested in the FERC. Mountain Fuel contends that the ERA exceeded its jurisdiction by imposing upon the FERC a specific ratemaking treatment for Northwest's costs. Southwest argues that the ERA's decision on the as-billed flow-through provision of Northwest's arrangement intrudes into areas traditionally regarded as the FERC's.

In issuing Order No. 87, the ERA was exercising its authority under Section 3 of the NGA. That authority relates generally to international transactions and covers exporter-importer arrangements. The ERA did not exercise any authority under Sections 4 and 5 of the NGA, nor any other authority delegated by the Secretary to the FERC. The ERA did deal with, and approve, the as-billed flow-through provision of the exporter-importer agreement. It is an integral part of the arrangement presented for review. The ERA found the structure of the two-part rate and its pass through on an as-billed basis to be in the public interest.

Insofar as interstate rate making implications of the import arrangement are concerned, it is up to the FERC to exercise its authority under Sections 4 and 5 of the NGA. The ERA understands that, in its review of import arrangements under Sections 4 and 5 of the NGA, the FERC will act in a manner consistent with the Secretary of Energy's delegation orders, Departmental policy, as contained in the policy guidelines, and DOE/ERA opinions and orders. In sum, we see no further need to clarify or otherwise change our language in Order No. 87 on this issue.

IV. Conclusion

The ERA has considered Northwest's amended agreement in the context of the company's entire market system and has found it on the whole to be a more competitive arrangement and one that offers greater benefits to the consumer than the previous arrangements. CIG, Mountain Fuel, and Southwest have failed to show that the ERA was in error when it issued Order No. 87. In addition, they have not raised any new matters in their rehearing requests that were not

considered in Order No. 87. In sum, the ERA finds the requests for rehearing considered in this order to be without merit. Accordingly, this order denies all applications for rehearing.

ORDER

For the reasons set forth above, pursuant to Sections 3 and 19 of the Natural Gas Act, it is ordered that:

(A) All applications for rehearing of Opinion and Order No. 87 are hereby denied.

(B) The request for a trial-type hearing filed by Mountain Fuel Resources, Inc. is hereby denied.

(C) The motion filed by Northwest Pipeline Corporation to strike the testimony of Lowell F. Gill attached to Mountain Fuel Resources, Inc.'s application for rehearing and the affidavit adopting that testimony in the ERA proceeding is hereby granted.

Issued in Washington, D.C., on November 8, 1985.

--Footnotes--

1/ 1 ERA Para. 70,604.

2/ Id. at 72,426-72,427 and 72,428.

3/ We note CIG also stated it considered Order No. 87 to be more in the nature of an advisory opinion and as such should be withdrawn. This is a frivolous argument. Order No. 87 constitutes an amendment and clarification of Northwest's authorization and has legal standing as a final order amending an authorization.

4/ 50 FR 23495, June 4, 1985, at 23497.

5/ Id.

6/ Transcript of the August 28, 1985, conference held in the matter of Northwest Pipeline Corporation, Docket Number 85-12-NG, August 30, 1985, at 27.

7/ Id. at 64.

8/ 10 CFR Part 590.313.

9/ Northwest stated at the conference it has never taken the position that the price under the contract would beat every spot market price and sale price throughout the Northwest system. It instead pointed out that the price under the amendment represented the price for the largest single source of supply on its system. See supra note 6 at 48-49.

10/ At the conference, Northwest acknowledged CIG's and Mountain Fuel's wish to purchase less gas from it, but stated it was unrealistic to expect that "Northwest, in its negotiations, could have obtained in addition to substantial price reductions . , . volume reductions to coincide with the short-term purchase desires and expectations of every one of its customers. Mountain Fuel and CIG both want to reduce contract demand. Indeed in CIG's case it has been indicated that they want to leave the Northwest system. This kind of abrupt departure from the Northwest system is something a short-term one-year agreement simply cannot take into account." See supra note 6 at 52.

11/ We note that in the ERA's proceedings substantial evidence is gathered in a number of ways, not just by trial-type hearing (as CIG and Mountain Fuel apparently believe), but also by written comments, conferences, and oral presentations. The information filed by the parties at all stages of the proceeding constitutes evidence on which the ERA may base findings.

12/ 49 FR 6684, February 22, 1984.

13/ Id. at 6689.

14/ Other parties in the proceeding who submitted evidence on the competitiveness of the Northwest agreement were Cascade Natural Gas Corporation, C.P. National Corporation, Intermountain Gas Company, Northwest Industrial Gas Users, Northwest Natural Gas Company, Washington Natural Gas Company, and Westcoast Transmission Company Limited.

15/ See supra note 6 at 26.

16/ Motion of Northwest Natural Gas Company to Intervene and Statement of Position in Support of Northwest Pipeline Corporation's Application, July 8, 1985, at 11 and 12; and Motion of Washington Natural Gas Company to Intervene in Support of Application of Northwest Pipeline Corporation, July 5, 1985, at 9.

17/ Petition of Cascade Natural Gas Corporation for Leave to Intervene

and Comments on Application, July 5, 1985, at 6, CP National Corporation's Motion to Intervene and Comments Supporting Northwest's Application, July 5, 1985, at 4-5, and Motion to Intervene of Intermountain Gas Company, July 3, 1985, at 13.

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

19/ Protest and Motion to Intervene of Mountain Fuel Resources, Inc., June 28, 1985, at 6.

20/ See supra note 17, Intermountain, at 13, and supra note 16, Northwest Natural, at 7.

21/ 50 FR 42408, October 18, 1985.