Cited as "1 ERA Para. 70,645"

Natural Gas Pipeline Company of America (ERA Docket No. 85-24-NG), May 15, 1986.

DOE/ERA Opinion and Order No. 124

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

I. Background

On October 15, 1985, Natural Gas Pipeline Company of America (Natural) 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), to amend an existing natural gas import authorization granted by the ERA on April 24, 1981, to Natural, Michigan Wisconsin Pipe Line Company (now ANR Pipeline Company) (ANR), Tennessee Gas Pipeline Company (Tennessee) and Texas Eastern Transmission Corporation (Texas Eastern) in DOE/ERA Opinion and Order No. 32 (Order 32).1/ Order 32 authorized the firms to import jointly up to 300,000 Mcf of natural gas per day through October 31, 1987, from ProGas Limited (ProGas) of Calgary, Alberta, Canada, under a May 17, 1979, agreement. ANR, Tennessee and Texas Eastern are not parties to this application. This application deals solely with the volumes imported by Natural and does not affect the other three ProGas customers.

Under the 1979 agreement, ProGas agreed to supply Natural a maximum daily quantity of 75,000 Mcf of natural gas, with a 75 percent take-or-pay obligation. The contract set the price at the rate prescribed by the Canadian government for gas exported to the U.S. Order 32 authorized an import price not to exceed $4.94 (U.S.) per MMBtu, the border price at the time. All of the volumes that Natural imports from ProGas are transported through the eastern leg of the prebuilt portion of the Alaskan Natural Gas Transportation System (ANGTS) to a point near Monchy, Saskatchewan, Canada, and delivered to Natural through the facilities of Northern Border Pipeline Company (Northern Border) and Northern Natural Pipeline Company (Northern).

Natural seeks approval of a February 8, 1985, amending agreement with ProGas that modifies the pricing provisions of its authorization which expires on October 31, 1987. The agreement would establish a two-part demand-commodity pricing structure to be passed through on an as-billed basis. The amendment provides for two-tier commodity prices of $2.60 per MMBtu for quantities taken up to 75 percent of annual contract levels and $2.50 per MMBtu for quantities

taken above 75 percent. The contract establishes a demand charge of $.50 per Mcf or $15.21 per Mcf of contract demand on a monthly basis at 100 percent load factor. Under the amended terms, commodity charges are to be adjusted quarterly based on changes in the composite U.S. refiners' acquisition cost of crude oil and demand charges are to be adjusted only as changes in fixed facility costs actually occur. At the time of filing, the amendment resulted in an estimated cost to Natural of $3.11 (U.S.) per MMBtu at the border, assuming purchases were being made at a level below 75 percent of annual contract quantities. Natural states that the amending agreement would not affect the term of the arrangement or the volumes to be imported.

According to Natural, the agreement provides for the purchase of ProGas volumes on a pro rata basis of comparably priced gas taken from Natural's U.S. suppliers. To the extent that gas is purchased above aggregate minimum take levels, the amendment calls for equivalent takes of ProGas supplies compared to domestic supplies at prices comparable to Natural's current commodity charges. In any circumstances where Natural's overall need for gas declines, the purchase of ProGas volumes would be reduced in a manner comparable to the reduction in purchases of similarly priced domestic volumes. Natural further states that the current annual take-or-pay requirement of 75 percent would be eliminated.

In support of its application, Natural submits that the Canadian gas is an integral part of its system supplies and continuation of the ProGas volumes under the amended sales agreement is essential for meeting existing customer demand.

In addition, Natural asserts that the proposed amendment meets DOE's natural gas import policy guidelines2/ because it (1) provides sufficient flexibility to permit pricing and volume adjustments as required by market conditions and available competing fuels including domestic natural gas; (2) contains provisions that will make the imported gas remain competitive in Natural's markets over the life of the amended sales agreement; and (3) contains price renegotiation provisions that will permit contractual price adjustments in the event of changed circumstances.

Natural concludes in its application that in light of ProGas' record of providing a reliable gas supply under the existing import authorization that these import volumes are both secure and reliable. Finally, because the amending agreement provides for a competitive price over the term of the agreement, Natural maintains that the ProGas volumes will continue to be needed to meet its system requirements.

II. Intervention and Comments

The ERA issued a notice of the application on November 15, 1985, inviting protests, motions to intervene, or comments to be filed by December 16, 1985.3/ The ERA received five motions to intervene and two notices of intervention in response to the Federal Register notice.4/ Iowa Gas Company's (Iowa Gas) and Northern Indiana Public Service Company's (NI-Gas) interventions were filed one day late. No delay in the proceeding or prejudice to any party will result from granting intervention to these late movants. Therefore, the late filings are accepted and this order grants intervention to all movants.

NI-Gas protested the application and requested a hearing in the event the ERA asserts jurisdiction over the issue of the as-billed flow through of the demand component in Natural's renegotiated rate. NI-Gas expresses concern that the as-billed flow through of Natural's two-part rate would discriminate against domestic producers who recover production-related costs through a pipeline commodity charge. NI-Gas contends that Canadian pipelines would be given an unfair regulatory advantage over competing U.S. pipelines if allowed to transfer production-related costs to the demand charge. NI-Gas also indicates doubt about the respective jurisdictions of the ERA and the Federal Energy Regulatory Commission (FERC), which currently has a related proceeding in which customers of Natural challenged the as-billed treatment of the demand charges under the ProGas and other Canadian import contracts.5/ Further, NI-Gas objects that ProGas is essentially a gas broker rather than a pipeline and therefore its charges do not qualify for as-billed treatment under FERC regulations. NI-Gas asserts that the purpose of the application is to moot the proceeding now pending before the FERC and that the ERA should deny Natural's filing as beyond its jurisdiction. Finally, NI-Gas argues that the ERA erred in approving the as-billed passthrough for Northwest Pipeline Company (Northwest) since it was a rate design matter within the FERC's exclusive jurisdiction.6/ NI-Gas contends that Natural's case also relates to ratemaking matters and no Section 3 issues within the ERA's jurisdiction were raised, therefore the ERA should not have accepted Natural's application.

The Peoples Gas Light and Coke Company and North Shore Gas Company (Peoples) jointly filed a conditional protest asking that hearings be held on the design of Natural's rates should the ERA decide it has authority to rule on the passthrough of Natural's costs from its Canadian suppliers. Peoples contends that the ERA does not have authority under Section 3 of the NGA to approve Natural's two-part rate for the passthrough of Canadian gas costs. It further contends that a hearing would be necessary to provide a forum for analyzing the elements of Canadian supplier charges to distinguish producer

costs from pipeline transmission costs.

While not specifically opposing the application, Iowa Gas asked that the ERA base its decision on the competitiveness of Natural's import arrangement and that it not address the issue of just and reasonable rates which the FERC has set for hearing.

ProGas filed in support of the application, stating that the two-part rate contained in Natural's amended contract is market-responsive, competitive, adjustable based upon alternative fuel costs, and a marked improvement over the pricing provisions contained in the previous agreement. According to ProGas, the renegotiated agreement reduces the base commodity price Natural pays for gas by 21 cents per MMBtu, eliminates take-or-pay obligations in lieu of ratable takes, makes provision for annual review and redetermination, and, since no extension of term or increase in the authorized level of imports is involved, necessitates no formal additional authorization by the ERA.

On December 27, 1985, Natural filed reply comments in opposition to the protests. Also, on December 31, 1985, ProGas filed supplemental comments in response to earlier protests reiterating its support for Natural's two-part pricing structure. In their reply comments, both Natural and ProGas contend that opponents of the as-billed passthrough of Natural's two-part rate narrowly focus on the FERC's ratemaking authority under Sections 4 and 5 of the NGA rather than look to the ERA's plenary import authority under Section 3.

ProGas asserts in its reply that arguments made by NI-Gas and Peoples overlook the benefits of its agreement with Natural including reduced costs, market-responsive price terms and elimination of the existing 75 percent take-or-pay requirement. ProGas contends that the 50 cent demand charge is equitable in relationship to the total Canadian fixed costs of more than 63 cents. In ProGas' opinion, the piecemeal disallowance of the passthrough of the demand charge urged by NI-Gas and peoples would have the effect of subverting negotiated agreements and substituting the hindsight judgment of a regulatory agency for the business judgment of a purchasing pipeline.

Both Natural and ProGas contend in their reply comments that the arrangement for which they seek approval is substantially similar to the two-part demand commodity pricing structure of Northwest in which the ERA concluded that the passthrough of costs as-billed is reasonable and consistent with the public interest.

III. Decision

Natural's application has been reviewed to determine if it conforms with Section 3 of 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." 7/ In making this finding, the ERA Administrator is guided by the DOE's natural gas import policy guidelines.8/ 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 distinguish renegotiations of previously authorized import arrangements from "new" arrangements not currently authorized. To avoid undermining already authorized import arrangements, especially one involving flowing gas such as the Natural/ProGas agreement, the guidelines provide that renegotiated contracts will be presumed to be in the public interest if they result in a more competitive import 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.9/

This proceeding involves an amendment of the pricing and related provisions of an existing arrangement covering flowing gas. The principal issue to be addressed in this proceeding is whether the existing, currently authorized import arrangement will be more competitive and market responsive under the renegotiated contract terms; and if so, whether the opposing parties have rebutted the presumption that the revised arrangement is in the public interest.

The ERA notes that the imported price of $4.94 (U.S.) per MMBtu has been substantially reduced since issuing Order No. 32 on April 24, 1981. Subsequently, the Canadian Government lowered the border price to $4.40 (U.S.) per MMBtu and on December 7, 1984, Natural formally notified the ERA that the Canadian National Energy Board (NEB) had approved the renegotiated price Natural would pay ProGas of $3.34 (U.S.) per MMBtu. The ERA also observes that under Natural's proposed two-part rate that the estimated border price it pays ProGas of $3.11 (U.S.) per MMBtu would result in savings of approximately $.23 (U.S.) per MMBtu and that rejection of the revised arrangement would result in reversion to the higher rate previously in effect to the detriment of Natural

and its customers. The ERA therefore finds the amended arrangement to be more competitive than the presently authorized agreement and thus more in conformity with the DOE's guidelines.

Parties opposing the application focus primarily on the two-part pricing structure, contending that the proposal to split the former one-part commodity charge for Canadian gas into a two-part demand and commodity charge, and any passthrough of such charges as billed, is unfair, uncompetitive, and anti-competitive for the following reasons: (1) the two-part demand/commodity rate permits allocation of a large part of the total price to the demand charge, thereby giving ProGas a competitive advantage over domestic producers who recover costs through a single and therefore higher charge; (2) because the two-part rate results in a lower commodity charge, opponents argue greater volumes of ProGas' gas will be purchased, thereby crowding out supplies of domestic producers; and (3) ProGas is [essentially] a broker rather than a pipeline and does not "qualify" for as-billed treatment under FERC regulations.

This arrangement is similar to domestic pipeline arrangements that utilize two-part rates and reflect the cost of providing transportation over long distances. Natural is utilizing pipeline facilities in Canada for this gas supply much as it utilizes domestic pipeline facilities in transporting domestically produced gas. Further, we do not believe that NI-Gas' allegation that ProGas is acting as a broker or the fact that FERC rate regulations would not apply to this or any Canadian entity are relevant considerations. What we do consider relevant, as we stated above, is the basic similarity between the two-part rate by ProGas and the rate structure used by domestic pipelines. The ERA sees no basis for not approving the two-part rate when it is used in arrangements comparable to domestic gas supply arrangements. It is the ERA's position, and the policy of the DOE, that since U.S. pipelines utilize and pass through two-part demand/commodity rates as billed, to avoid discrimination, Canadian natural gas should be afforded the same opportunity to compete in U.S. markets.10/

The ERA therefore finds that the renegotiated contract terms, when applied to the existing, currently authorized import will result in a more competitive and market-responsive arrangement. The two-part demand/commodity price structure is reasonable and therefore not inconsistent with the public interest. As previously noted, the DOE takes the position that the two-part rate design utilized in Canadian import arrangements is largely analogous to two-part rates in domestic tariffs, and should be approved as such.

The remaining concerns raised by opponents to Natural's application relate to collateral legal matters. All of the parties to this proceeding

discuss whether they believe the ERA has jurisdiction to approve the two-part demand/commodity structure and its passthrough on an as-billed basis.

The ERA has addressed this question of jurisdiction and the relationship between the import authorities of the ERA and the FERC at length in prior decisions. In its final decision in the Northwest case, the ERA stated,

> [o]nly 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.11/

The ERA sustained its decision on rehearing.12/

As noted earlier in this opinion, the ERA endorses in principle the passthrough of the two-part structure of the arrangement, but not necessarily the passthrough of every single cost element exactly as proposed. It is within the FERC's jurisdiction in an exercise of its authority under Sections 4 and 5 of the NGA to approve these specific elements while acting in a manner consistent with the ERA's decisions and the DOE's policies. Clearly, if there are components of a demand charge, such as production-related costs that the FERC would not normally permit to be treated as fixed costs, the Canadian import should be treated no differently. However, if the international contract, freely negotiated by commercial parties and approved by the ERA, includes cost recovery provisions that achieve reasonable results and are in compliance with applicable laws, the ERA urges regulatory restraint from any unnecessary intrusion into private contract matters.

NI-Gas and Peoples have requested a trial-type hearing in this proceeding on the grounds that such a hearing is necessary to resolve certain factual, policy and legal issues including: (1) whether Natural's rate design would discriminate against domestic producers; (2) whether the elements of Natural's rates distinguish producer-related costs from pipeline transmission costs; and (3) whether any Section 3 issues under the NGA have been raised and should the application be dismissed.

Section 590.313 of the ERA's administrative procedures requires a party requesting a trial-type hearing to demonstrate the existence of relevant and material issue(s) of fact genuinely in dispute.13/ This demonstration has not been made. Arguments regarding the competitiveness of the two-part rate relate to policy issues involving treatment of imported gas and FERC rate design

decisions and their implementation, not factual issues. The jurisdictional question is a question of law not fact. Those who challenge the border and delivered price, despite ample opportunity to comment in response to the Federal Register notice of the application, do not dispute facts which are relevant and material to the limited scope of this decision. Accordingly, the requests for a trial-type hearing by NI-Gas and Peoples are hereby denied.

After taking into consideration all of the information in the record of this proceeding, I find that the amended authorization requested by Natural is not inconsistent with the public interest and should be granted.14/

Order

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

A. The import authorization granted Natural Gas Pipeline Company of America (Natural) in DOE/ERA Opinion and Order No. 32 issued April 24, 1981, in ERA Docket No. 79-15-NG is hereby amended to allow Natural to import Canadian natural gas in accordance with the provisions of the February 8, 1985, amending agreement between Natural and its Canadian supplier, ProGas Limited, submitted as a part of the application filed by Natural on October 15, 1985.

B. Natural 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.

C. The requests for a trial-type hearing filed by Northern Illinois Gas Company, The Peoples Gas Light and Coke Company and North Shore Gas Company are hereby denied.

D. The motions to intervene, as set forth in this Opinion and Order, are hereby granted, provided that participation of the intervenors shall be limited to matters specifically set forth in their motions to intervene and not herein specifically denied, and that the admission of such intervenors shall not be construed as recognition that they might be aggrieved because of any order issued in these proceedings.

Issued in Washington, D.C., on May 15, 1986.

--Footnotes--

1/ 1 ERA Para. 70,530.

2/ 49 FR 6684, February 22, 1984.

3/ 50 FR 47250, November 15, 1985.

4/ Intervenors are:

(1) Northern Illinois Gas Company

(2) ProGas Limited

(3) Texas Eastern Transmission Corporation

(4) Iowa Gas Company

(5) The Peoples Gas Light and Coke Company and North Shore Gas Company (joint motion)

(6) Iowa State Commerce Commission

(7)Northern Indiana Public Service Company

5/ Natural Gas Pipeline Company of America, FERC Docket No. TA85-1-26-004 accepted for filing March 20, 1985.

6/ Northwest Pipeline Corporation, DOE/ERA Opinion and Order No. 87, 1 ERA Para. 70,604 (September 10, 1985).

7/ 15 U.S.C. Sec. 717(b).

8/ See supra note 2.

9/ Id., at 6689.

10/ As stated in Comments on the United States Department of Energy, FERC Docket No. RM 85-1-000 (Part D), November 18, 1985, at 7: "The Department wants to reiterate its previous position that there should be no regulatory distinction between the treatment of domestic and imported gas supplies. If the as-billed principle is to be preserved, as stated in the Commission's Notice, it should be applied to imported gas as well. The Department believes

the two-part rate design utilized in these new import arrangements is largely analogous to two-part rates that are accepted in domestic tariffs that recognize the costs in providing transportation over long distances. We see no rationale for denying imported gas the same treatment with regard to as-billed passthrough that is available to domestic pipelines. If the Commission has concerns about the allocation of imported gas costs between demand and commodity charges, it has sufficient authority to take the appropriate action. However, as long as the result of international contracts freely negotiated between commercial parties is reasonable and is approved by the Economic Regulatory Administration, we urge regulatory restraint in any unnecessary intrusion into private contractual matters."

11/ See supra, note 6, at 17.

12/ Northwest Pipeline Corporation, DOE/ERA Opinion and Order No. 87A, 1 ERA Para. 70,609 (November 8, 1985).

13/ 10 CFR Sec. 590.313.

14/ 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 major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act (42 U.S.C. 4321, et seq.) and therefore an environmental impact statement or environmental assessment is not required.