Cited as "1 ERA Para. 70,684"

Tennessee Gas Pipeline Company (ERA Docket No. 85-40-NG), Western Gas Marketing U.S.A., Ltd. (ERA Docket No. 86-08-NG), Enron Gas Marketing, Inc. (ERA Docket No. 86-09-NG), January 5, 1987.

DOE/ERA Opinion and Order Nos. 151-A, 152-A, and 153-A

Order Denying Rehearing and Stay of Orders

I. Background

On November 6, 1986, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order Nos. 151 (Order 151 (Order No. 151), 152 (Order No. 152), and 153 (Order No. 153), in ERA Docket Nos. 85-40-NG, 86-08-NG, and 86-09-NG, respectively.1/

Each order granted the applicant blanket authority to import Canadian natural gas through existing pipeline facilities for up to two years.

Producers intervened in all three of the above proceedings seeking summary dismissal of each application. In the alternative to rejecting each application, Producers requested that the ERA either hold a trial-type hearing or impose a condition on each authorization that would require that any gas imported under the authorization be transported through pipelines providing open access under the Federal Energy Regulatory Commission's (FERC) Order 436 2/ program. Producers' opposition was premised on their concern over the alleged negative impact on domestic producers of competition from Canadian imports which, they maintain, receive unequal delivery access to domestic gas markets. After combined proceedings, the subject orders were each issued without the requested condition.

II. Application for Rehearing

On December 4, 1986, the Panhandle Producers and Royalty Owners Association (PPROA), the West Central Texas Oil and Gas Association, North Texas Oil and Gas Association, East Texas Producers and Royalty Owners Association, and the Independent Petroleum Association of New Mexico (hereinafter referred to collectively as Producers) filed a joint request for rehearing and requested a stay of Order Nos. 151, 152, and 153.

Producers' request for rehearing is based on their contention that, in issuing each order, the ERA erred in ten significant areas. Producers allege

that the ERA erred in relying on the natural gas policy guidelines3/ in making its determination; that it erroneously assigned the burden of proof to the Producers; that it failed to assess the need for imported gas, or the anticompetitive effects of the orders resulting in harm to domestic supplies; that it failed to follow its regulations during the procedures; that its action created a regulatory gap for unregulated marketing brokers; that it failed to give proper consideration to Producers' requested condition; that it failed to conduct the requested evidentiary hearing; that it failed to conduct an environmental assessment; and finally, that the ERA failed to consider the competitive merits of the three subject applications on a mutually exclusive basis with all other pending applications.

III. Decision

Producers argue that the ERA should grant a rehearing on the grounds of the stated errors which can be categorized into two general areas of procedural due process, and evidentiary sufficiency of the record to support the issuance of the orders.

A. Procedural Arguments

Producers made several arguments with respect to the procedural aspects in each of the dockets. In addition to alleging that the ERA's decision in each docket was improperly based on the February 22, 1984, guidelines for natural gas imports, because those guidelines were not promulgated as a substantive rule in accordance with the Administrative Procedure Act (5 U.S.C. Section 553), the Producers raise the related burden of proof question, the denial of an evidentiary trial-type hearing including the failure to consider the competitive merits of other mutually exclusive applications to move imports through limited border facilities, and the failure to conduct an environmental assessment or otherwise comply with the provisions of the National Environmental Policy Act (NEPA).

Except for the last alleged procedural error, Producers have raised these issues in each step of the proceedings in these dockets and PPROA has also raised many of these issues in earlier proceedings.4/ The ERA has either adequately discussed these questions or provided further proceedings in accordance with the procedural rules covering the ERA's disposition of applications to import or export natural gas.5/ Producers submit nothing new in their arguments nor do they provide any new evidence demonstrating error in the issuance of these orders. The only new issue raised pertains to the alleged noncompliance with the requirements of the NEPA.

The allegation that ERA did not comply with NEPA in issuing the orders is without merit. DOE guidelines for NEPA compliance6/ provide for three possible levels of analysis, depending on the potential for environmental impact. In cases where there is clearly a potential for significant impact, an environmental impact statement (EIS) is prepared. In uncertain cases, an environmental assessment (EA) is prepared to determine if an EIS is needed. In situations when clearly no significant impacts will occur which could necessitate the preparation of an EIS, a memorandum to the file is prepared to document this fact. Memoranda of this type were prepared for each of the subject orders. The analysis contained therein supports the conclusion in each case that, because existing pipelines will be used, clearly there should be no significant impacts to the physical environment. Indeed, the intervenors have alleged only that the ERA should analyze a potential for significant socio-economic impacts. However, it is well established by both case law and by regulation that socio-economic impact alone will not establish a basis for requiring an EIS.7/ Therefore, a memorandum to the file is the appropriate level of NEPA compliance when no other issues which involve the physical environment are at issue.

Section D of the DOE NEPA guidelines lists the granting of import licenses under Section 3 of the Natural Gas Act as an action which normally requires an EA. This reflects DOE's conservative approach in categorizing actions which may have the potential for impacts. However, the operative word for applying this section of those guidelines in this case is "normally", and actions treated differently than the categories established in Section D are required to be individually examined.

Producers argue that we did not comply with the DOE NEPA guidelines. However, the presence of such a categorization and presumption in the DOE NEPA guidelines does not override the basic principle of law stated above regarding the insufficiency of socio-economic impacts alone to trigger NEPA. The DOE fulfilled its obligation by examining the licensing actions in light of the presumption created by the DOE NEPA guidelines and concluding that the presumption was rebutted because of the lack of impact on the physical environment. Under these circumstances, a memorandum to the file is appropriate.

B. Substantial Evidence Arguments

Producers argue that the ERA made a number of substantial evidentiary errors in Order Nos. 151, 152, and 153, citing the ERA's alleged failure to assess the need for the gas imports, the failure to consider the harm to domestic supplies, the creation of a "regulatory gap" and unregulated

middleman's fees by authorizing "brokering" of imports, the failure to consider the comparative merits of import applications, and the failure to consider the anticompetitive effects of gas imported without the proposed condition requiring the gas to be transported through Order 436 open-access pipelines.

These alleged errors were all issues raised by Producers early in the proceedings in the subject dockets. The questions of need, harm to domestic supplies, and improper "brokering" have also been raised by PPROA in earlier proceedings concerning import applications.8/ The ERA adequately discussed these issues in Order Nos. 151, 152, and 153. Producers submit nothing new in their arguments on these issues in the joint rehearing request.

Producers repeat the argument that the ERA must consider the relative merits of mutually exclusive import applications because total volumes in these and other authorizations would exceed the pipelines' transportation capacities. However, as the ERA has clearly stated, such import authorizations are not exclusive import authorizations. Granting one import authorization does not effectively preclude granting another. Blanket import authorizations are not mutually exclusive because applicants are not competing for authorization. Rather, the blanket import authorizations granted by the ERA permit authorization holders to compete for markets, and total import sales are and will remain far below the sum of all authorization limits.

The proposed condition raised by Producers in each of the three dockets became the subject of combined proceedings that offered opportunity for further comment on this issue. The ERA thoroughly explored the issue before denying the proposed condition. Producers now claim again that if the proposed condition is not adopted, domestic gas is disadvantaged because Canadian gas may be transported under Section 7(c) transportation certificates and also under "interim" and "grandfathered" transportation arrangements in connection with a transition by individual pipelines to open-access status under FERC Order 436. The ERA observes that the same transportation arrangements are available for and are being utilized in the marketing of domestic gas. The large majority of respondents who opposed the proposed condition for imported gas observed that such a condition, if adopted, would discriminate against imported gas by denying it transportation opportunities still available for moving domestic gas. Producers have not demonstrated that the ERA made an error, nor have convinced us to change our finding in the three orders that U.S. and Canadian participants in the U.S. gas market are currently on an equal footing with respect to opportunities to transport domestic and imported gas in the U.S. market.

In connection with their argument that imported gas enjoys an anticompetitive advantage over domestic gas, absent the proposed condition, Producers also restate the charge that pipeline marketing affiliates are a source of such anticompetitive advantage and that they "may control which specific import arrangements will be consummated and choose imported gas over domestic gas." As the ERA noted in Order Nos. 152 and 153, affiliate relationships also exist between domestic suppliers and transporters. The question of pipeline marketing affiliates, and what problems they might create, is not unique to the marketing of imported gas. Rather, it is a generic gas market issue. If there is a problem here, the proposed condition will not solve it. The ERA believes that the FERC is the proper forum for examining affiliate relationships. On November 14, 1986, the FERC issued a Notice of Inquiry on the subject.9/

IV. Conclusion

The ERA has determined that the Producers' application for rehearing presents no information that would merit reconsideration of our findings in Order Nos. 151, 152, and 153. Accordingly, this order denies Producers' request for rehearing and its request for stay of the subject orders.

ORDER

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

The application for rehearing and request for stay of DOE/ERA Opinion and Order Nos. 151, 152, and 153 submitted jointly by Panhandle Producers and Royalty Owners Association, West Central Texas Oil and Gas Association, North Texas Oil and Gas Association, East Texas Producers and Royalty Owners Association, and the Independent Petroleum Association of New Mexico are hereby denied.

Issued in Washington, D.C., on January 5, 1987.

--Footnotes--

1/ Tennessee Gas Pipeline Company, 1 ERA Para. 70,674; Western Gas Marketing U.S.A., Ltd., 1 ERA Para. 70,675; and Enron Gas Marketing, Inc., 1 ERA Para. 70,676.

2/ The FERC's Order 436 established a voluntary program under which a pipeline agrees to provide non-discriminatory transportation for all customers

on a first-come, first-served basis. Open access to such transportation would allow non-traditional suppliers such as independent producers to ship their gas to any market where they could find customers. FERC Statutes and Regulations, Para. 30,665.

3/ 49 FR 6684, February 22, 1984.

4/ Northridge Petroleum Marketing U.S., Inc., 1 ERA Para. 70,610 (November 27, 1985); Salmon Resources, Ltd., 1 ERA Para. 70,612 (December 16, 1985); CPEX Pacific, Inc., 1 ERA Para. 70,616 (December 20, 1985); Northeast Gas, Inc., 1 ERA Para. 70,613 (December 20, 1985); Northwest Pipeline Corporation, 1 ERA Para. 70,629 (February 10, 1986); Michigan Consolidated Gas Company, 1 ERA Para. 70,630 (February 21, 1986); CPEX Pacific, Inc., 1 ERA Para. 70,631 (February 21, 1986); and Texas Eastern Transmission Corporation, 1 ERA Para. 70,646 (May 21, 1986).

5/ 10 CFR Part 590.

6/ Department of Energy Guidelines for Compliance with the National Environmental Policy Act, (45 FR 20694, March 28, 1980; as amended at 47 FR 7976, February 23, 1982; 48 FR 685, January 6, 1983 and 50 FR 7629, February 25, 1985).

7/ National Association of Government Employees v. Rumsfeld, 418 F.Supp. 1302 (ED Pa, 1976); and 40 CFR Sec. 1508.14.

8/ See supra note 4.

9/ Notice of Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Federal Energy Regulatory Commission, Docket No. RM87-5-000, November 14, 1986.