Cited as "1 ERA Para. 70,691"

Bonus Energy, Inc. (ERA Docket No. 86-52-NG), March 24, 1987.

DOE/ERA Opinion and Order No. 166

Order Granting Blanket Authorization to Import Natural Gas from Canada

I. Background

On September 11, 1986, Bonus Energy, Inc. (Bonus), 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), for blanket authorization to import up to 100 MMcf per day of Canadian natural gas, and a maximum of 50 Bcf over a two-year period, beginning on the date of first delivery. The applicant, a corporation registered in the State of Oklahoma, is a wholly-owned subsidiary of Bonus Petroleum Corporation.

Bonus proposes to import gas supplied by its affiliate, Bonus Gas Processors Corporation, and by other reliable Canadian suppliers, including Diamond Shamrock. The gas will be imported for Bonus' own account or for the accounts of others, and for resale on the short-term or spot market. The customers are expected to include local distribution companies, pipelines, and commercial and industrial end-users. Bonus states that the terms of each arrangement will be negotiated on an individual basis and will include price, volume, and price-adjustment and volume-adjustment provisions to meet competition in the marketplace.

The applicant proposes to file quarterly reports with the ERA. Each report would indicate by month the transactions made during the period and the details of such transactions. Bonus intends to utilize existing facilities for the transportation of the gas and, therefore, does not contemplate the construction of any new facilities.

In support of its application, Bonus maintains that the requested blanket authorization is in accordance with the DOE's policy of encouraging competitive and market-responsive pricing, and will enable it to respond rapidly to the quickly changing spot market and to make supplies of Canadian natural gas available to a wide range of U.S. markets.

Bonus requested expedited treatment of its application, including dispensing with the procedure of providing an opportunity for additional comments. The application did not support the request for expedited treatment.

II. Interventions and Comments

The ERA issued a notice of the application on September 26, 1986, with protests, motions to intervene, or comments to be filed by November 3, 1986.1/ Motions to intervene, without comment or request for additional procedures, were received from El Paso Natural Gas Company, Northwest Alaskan Pipeline Company, Northwest Pipeline Corporation, Pacific Gas Transmission Company, and Southern California Gas Company. A joint filing by ten producer associations (Producers) opposed the application.2/ This order grants intervention to all movants.

Producers represent the interests of independent producers and royalty owners, plus some service companies, in California, Kansas, New Mexico, New York, Oklahoma, Texas, and the Rocky Mountain area. They sell gas in connection with Canadian imports to interstate pipelines.

In opposing the application, Producers allege that (1) there is great unrest and turmoil in the natural gas market and, as a result, it is impossible for the ERA to accurately determine the national need for the gas; (2) approval of the import would give Bonus the right to sell its Section 3 authorization, such "brokering" of Section 3 entitlements being impermissible under the NGA; (3) the application is deficient under 10 CFR Sec. 590.203; (4) many of the pipelines with which Bonus deals have not become voluntary transporters under Federal Energy Regulatory Commission (FERC) Order 436, and transportation capacity would not be made available to domestic producers willing to sell gas at lower prices;3/ and (5) in relying upon the DOE's natural gas import policy guidelines,4/ the ERA must follow its position in its Opinion and Order No. 88A 5/ that the policy guidelines do not have the effect of a substantive rule, which would require the applicant to develop evidence in a particular proceeding "as if the policy statement had never been issued."6/

If the application is not rejected, Producers request a trial-type hearing. Producers raise the following issues as "disputed issues of material fact" to be addressed in such a proceeding: (1) whether blanket importation authorizations are inconsistent with the national security objectives that Section 3 is designed to protect; (2) the identity of Bonus' prospective suppliers and purchasers and security of those supplies; (3) whether the proposed importation serves the needs of specific gas markets; (4) whether the proposed import price is consistent with the public interest and whether that price includes any brokering fees; (5) whether Bonus' application would hinder competition by forestalling the transporting pipelines' ultimate need to become Order 436 transporters; and (6) how available capacity at border

facilities should be allocated between this authorization and other approved and proposed import volumes.

Producers further request that, if the ERA neither rejects the import proposal nor schedules a trial-type hearing, the authorization be conditioned upon the adoption of voluntary, open-access status under FERC Order No. 436 by any pipeline transporters of gas imported under such authorization.

Bonus filed a response to the Producers' comments on November 18, 1986. Bonus noted that arguments to attach the FERC Order No. 436 condition to imported gas have been rejected in recent ERA orders. Rather than repeating these arguments, Bonus directed the ERA's attention to the information submitted in its application and in the recent ERA orders. Bonus stated that Producers presented no new arguments in support of their position and that granting Bonus' application would promote competition in the gas marketplace, whereas granting Producers' request would be inconsistent with the equal treatment policy of the ERA and the FERC.

III. Decision

The application filed by Bonus has been evaluated to determine if the proposed import arrangement meets the public interest requirements of Section 3 of the NGA. Under Section 3, an import must be authorized unless there is a finding that it "will not be consistent with the public interest."7/ The Administrator is guided by the DOE's natural gas import policy guidelines.8/ Under these guidelines, the competitiveness of an import in the markets served is the primary consideration for meeting the public interest test.

Producers raise a number of objections to this application which are addressed below. All of their objections have been raised in previous ERA proceedings and were denied there. No information has been presented in this docket to show that this case is different from those where the issues were previously raised or to lead us to change our position on these issues from that taken in previous proceedings. We therefore discuss them only briefly.

As in previous proceedings,9/ Producers complain that pipelines will not make transportation available to domestic producers in a way that would allow them to compete with Canadian imports, and request the ERA to condition the authorization to require that gas imported under the authorization be transported only by pipelines that have become open-access transporters under FERC Order 436. In those previous proceedings, the ERA concluded, after careful review, that no evidence was presented that domestic producers are more disadvantaged than Canadian producers by the absence of open-access

transportation. The ERA concluded that domestic and Canadian suppliers are experiencing similar marketing and transportation difficulties. The ERA found that the condition requested by Producers would disturb what the ERA described in those proceedings as the "current equal footing" of U.S. and Canadian participants in the gas market, that it would be discriminatory to impose a requirement applying to imported but not domestic supplies and would therefore lessen competition in the marketplace, and that the condition is inconsistent with the commitment to equal treatment and free negotiation embodied in current U.S. gas import policy.

Producers have submitted no new evidence or arguments in this docket to support their opposition or to compel ERA to change its position. Therefore, for the above-stated reasons which are discussed in greater detail in previous cases, the ERA is denying Producers' request in this docket that any gas imported under this proposal be transported by pipelines that are Order 436 carriers.

In support of their request for summary denial of the application, Producers argue that Bonus has failed to meet its burden of proof to demonstrate a need for gas imported under the requested authorization. They also argue that the application is deficient because pipelines with which Bonus will deal have not sought authority to transport the gas under FERC's Order 436.

The ERA examines the issue of need in terms of the marketability of the proposed import, and considers need to be a function of competitive arms length negotiations.10/ Contrary to the argument advanced by the Producers in this proceeding, and by Panhandle Producers and Royalty Owners Association in prior proceedings, import arrangements, if they are freely negotiated and provide for a supply of gas that is marketable over the term of the contract, are presumptively competitive and in the public interest. Producers suggest that, not only has Bonus failed to demonstrate need, but that in the "unrest and turmoil" of the current market, the ERA is unable to make a determination of need. However, the gas market, even when more heavily regulated than now, but particularly during this period of transition to a more competitive market, is not a static environment. Producers' argument, if accepted, could stop the ERA from authorizing imports whenever the market is in transition. We believe the market will determine need if allowed to function free from unnecessary governmental interference.

The ERA disagrees with Producers' contentions with respect to certification of transportation arrangements. While certainly of importance to the commercial parties to an import proposal, arrangements for domestic

transportation of imported gas are not relevant to the ERA's determination of whether an import is consistent with the public interest. Neither the NGA nor ERA regulations limit agency authority to approve import applications to those where the FERC already has certificated downstream transportation arrangements. Moreover, the gas clearly would not flow unless effective transportation arrangements are certified.

Producers request an "evidentiary hearing on the record to determine disputed issues of material fact" in the event that the ERA denies their requested summary dismissal of Bonus' application or denies their proposed open-access transportation condition. To support this request, they argue that all pending applications are "mutually exclusive" and that the ERA is required to "conduct competitive hearings" because the total volumes authorized for import exceed the physical capacity of border facilities and because there is less national need for Canadian imports.11/

Neither argument supports the claim of mutual exclusivity made by Producers. In a competitive marketplace, freely negotiated, market-responsive arrangements enhance competition to the benefit of consumers and the long-term health of the industry. Although Producers cites Ashbacker Radio Corp. v. F.C.C.,12/ which requires agency consideration of competing applications in a single proceeding where an agency's grant of one license effectively would preclude its grant of a competing application, the case does not apply here. Authorizations to import under market-responsive arrangements are not mutually exclusive because applicants are not competing for authorization. They are competing for markets and ERA approval of market-responsive import arrangements provides them with this opportunity. Market forces, not regulatory intervention, will allocate available capacity efficiently and economically.

In addition to need and capacity limitations, Producers include in their list of allegedly disputed issues requiring a trial-type hearing, security of supply, the consistency of blanket import authorizations with other, unspecified national security objectives, the identity of prospective suppliers and purchasers, the proposed import price including any brokering fees, and whether approval of Bonus' application would "forestall" the decision of pipelines to become open-access transporters under FERC's Order 436.

Apart from the last issue, which concerns the FERC's voluntary Order 436 program and which was discussed above, all other issues allegedly in dispute bear on the general nature of ERA's two-year blanket import arrangements. These issues do not involve adjudicative facts but rather are matters of

policy. In authorizing such market-responsive import arrangements, the ERA has concluded that advance notice of specific pricing information and identity of suppliers and purchasers are not necessary for the agency to determine the public interest. This conclusion applies to the application of Bonus, which contemplates purchases of imports directly by end-users who freely participate in negotiating the contractual arrangements for the Canadian gas that they buy. Nor do security of supply or other "national security objectives" constitute adjudicative facts in light of both Canada's historical reliability as a supplier and the current free trade focus of bilateral negotiations.

Producers also claims that approval of the import would give Bonus the right to sell or broker its Section 3 authorization, and contend this is not permissible under the statute. As the ERA has stated previously, an import arrangement where the importer is a broker does not constitute a delegation of Section 3 authority but rather is a determination that the public interest does not rely on whether title to the gas has been taken.13/ If the delivered cost of imported gas includes a broker's commission and "is not competitive with other available supplies, the transaction presumably would not take place." 14/

The ERA has reviewed Producers' request for a trial-type hearing and has determined that Producers has failed to demonstrate that any genuine issues of adjudicative fact material to making a decision on Bonus' application remain in dispute. The ERA has decided that a trial-type hearing would not contribute to the development of issues relevant to this proceeding and is not in the public interest. Producers' request is therefore denied.

The Bonus arrangement for the import of Canadian gas, as set forth in the application is consistent with the DOE policy guidelines. The fact that each spot sale will be voluntarily negotiated, short-term, and market-responsive, as asserted in Bonus' application, provides assurance that the transactions will be competitive. Under the proposed import, Bonus' customers will only purchase gas to the extent they need such volumes and the price is competitive. Thus, this arrangement will enhance competition in the marketplace.

After taking into consideration all the information in the record of this proceeding, I find that granting Bonus blanket authority to import up to 100 MMcf of Canadian natural gas per day, and a maximum of 50 Bcf over a two-year term, is not inconsistent with the public interest.15/

ORDER

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

A. Bonus Energy, Inc. (Bonus), is authorized to import up to 100 MMcf of Canadian natural gas per day, and a maximum of 50 Bcf over a two-year period, beginning on the date of first delivery.

B. Bonus shall notify the ERA in writing of the date of first delivery of natural gas imported under Ordering Paragraph A above within two weeks after the date of such delivery.

C. With respect to the imports authorized by this Order, Bonus shall file with the ERA, within 30 days following each calendar quarter, quarterly reports indicating whether sales of imported gas have been made and, if so, giving, by month, the total volume of the imports in MMcf and the average purchase price per MMBtu at the international border. The report shall also provide the details of each transaction, including the names of the sellers and purchasers, duration of the agreements, transporters, points of entry, markets served and, if applicable, any demand/commodity charge breakdown of the contract price, any special contract price adjustment clauses, and any take-or-pay or make-up provisions.

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.

E. The requests by California Independent Producers Association, East Texas Producers & Royalty Owners Association, Energy Consumers and Producers Association, Independent Oil & Gas Association of New York Inc., Independent Petroleum Association of America, Independent Petroleum Association of Mountain States, Independent Petroleum Association of New Mexico, North Texas Oil & Gas Association, Panhandle Producers and Royalty Owners Association, and West Central Texas Oil and Gas Association for dismissal of Bonus' application, a trial-type hearing, and imposition of a condition requiring that all gas imported under this authorization be transported only by open-access transporters under the Federal Energy Regulatory Commission's Order No. 436 are denied.

Issued in Washington, D.C. March 24, 1987.

--Footnotes--

1/ 51 FR 35394, October 3, 1986.

2/ California Independent Producers Association, East Texas Producers & Royalty Owners Association, Energy Consumers and Producers Association, Independent Oil & Gas Association of New York Inc., Independent Petroleum Association of America, Independent Petroleum Association of Mountain States, Independent Petroleum Association of New Mexico, North Texas Oil & Gas Association, Panhandle Producers and Royalty Owners Association, and West Central Texas Oil and Gas Association.

3/ 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.

4/ 49 FR 6684, February 22, 1984.

5/ See Northridge Petroleum Marketing U.S., Inc., 1 ERA Para. 70,610 (November 27, 1985).

6/ As authority for this statement, Producers cite Pacific Gas and Electric v. FPC, 506 F.2d 33 (D.C. Cir. 1974).

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

8/ 49 FR 6684, February 22, 1984.

9/ See e.g., Tennessee Gas Pipeline Company, 1 ERA Para. 70,674 (November 6, 1986); Western Gas Marketing U.S.A., Ltd., 1 ERA Para. 70,675 (November 6, 1986); Enron Gas Marketing Inc., 1 ERA Para. 70,676 (November 6, 1986); Northwest Marketing Company, 1 ERA Para. 70,677 (November 7, 1986).

10/ See supra note 4.

11/ Comments and Petition for Leave to Intervene of Producers Associations, November 3, 1986, at 6.

12/ 326 U.S. 327 (1945).

13/ See e.g., Natural Gas Clearinghouse, Ltd., 1 ERA Para. 70,602 (July 5, 1985) at p. 72,421; Northridge Petroleum Marketing U.S. Inc., 1 ERA Para. 70,605 (September 27, 1985) at p. 72,433.

14/ Northridge Petroleum Marketing U.S. Inc., 1 ERA Para. 70,610 (November 27, 1985).

15/ Because the proposed importation of gas will use existing pipeline facilities, the DOE has determined that granting this application is clearly 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.