

Cited as "1 ERA Para. 70,724"

Granite State Gas Transmission, Inc. (ERA Docket No. 86-43-NG), October 5, 1987.

DOE/ERA Opinion and Order No. 187-A

Order Denying Rehearing

### I. Background

On August 5, 1987, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 187 (Opinion 187) in ERA Docket No. 86-43-NG.1/ Opinion 187 authorizes Granite State Gas Transmission, Inc. (Granite State), to import up to 25,000 Mcf of Canadian natural gas per day on an interruptible, best-efforts basis from November 1, 1987, through October 31, 1988. Beginning on November 1, 1988, and extending through March 31, 1999, the import authorization allows Granite State to increase its imports to a total of 40,000 Mcf per day on a firm basis and an additional daily quantity of up to 15,000 Mcf on an interruptible basis.

One intervenor, the New England Fuel Institute (NEFI), protested Granite State's application and requested a trial-type hearing. NEFI, an association of small and independent home heating oil distributors in the six-state New England region, states that its members are in direct competition with the distribution company customers of Granite State. NEFI's opposition to the proposed import project is premised on its concerns that the proposed Canadian gas import would not be competitive in all markets proposed to be served by this supply, is not needed, and would provide Canadian gas suppliers with an unfair competitive advantage over domestic gas suppliers because of the proposed two-part demand/commodity rate structure contained in its gas purchase contract. In addition to these issues, the NEFI argues in subsequent filings with the ERA that Granite State's contingency supply plans in the event of early termination of its pipeline lease are also inadequate. In Opinion 187, the ERA denied NEFI's request for additional procedures, specifically a trial-type hearing, based on a determination that the NEFI had not demonstrated that the requested hearing was necessary to further develop the facts and it therefore was not in the public interest to hold additional procedures.

On September 4, 1987, the NEFI filed a request for rehearing of Opinion 187. In support of its request, the NEFI argues the ERA erred in two major respects. First, NEFI states that the ERA improperly denied its request for a

trial-type hearing on disputed material issues of fact related to the competitiveness and need for this supply, the effect on domestic gas producers of pricing terms contained in the gas purchase contract, and the long-term security of the supply.

Second, the NEFI argues that the ERA has improperly relied on a presumption of need that derives from the ERA's policy guidelines because they were not promulgated as a substantive rule and cannot be treated as a "formal statement of policy implementing the Natural Gas Act." The ERA may not presume need, the NEFI asserts, but must find that need exists based on evidence which the applicant has the burden of presenting. The NEFI further adds that even if the presumption is valid, it does not apply here because the proposed import arrangement cannot be found to be competitive over the entire term of the arrangement. To support this contention, the NEFI focuses on the two-part demand/commodity rate structure found in Granite State's gas purchase contract with Shell Canada Limited (Shell Canada) and argues that the contract is designed only to be competitive at a 100 percent load factor. If less than 100 percent of contract volumes are taken, the NEFI maintains that the demand component will rise to such a level that will make the per unit price of this gas supply uncompetitive.

## II. Decision

The NEFI has submitted no new information in support of its alleged disputed factual issues that would compel the ERA to reconsider its decisions in Opinion 187. We note first that we consider the "factual" issues identified by the NEFI to be fundamentally policy, not factual, in nature. Second, the ERA has addressed in this proceeding all of the underlying policy questions raised by NEFI, including those so-called "factual" issues.

The policy guidelines were never intended to be promulgated as a substantive rulemaking to which the ERA would automatically be bound. They were intended to provide the public with a clear indication of those factors that would guide the Administrator of the ERA in making a Section 3 "public interest" determination in each case. They do not require a particular finding and each case ultimately is decided on the facts and record of that individual case. The general policy established by the guidelines is made up of certain rebuttable presumptions and concomitant burden of proof. Contrary to the NEFI's assertion, the ERA can rely on the policy guidelines, including the presumptions, so long as the guidelines are non-binding and the presumptions rebuttable. Any intervenor is free to submit any facts or arguments in support of his position to rebut the presumptions and persuade the Administrator to come to a different conclusion. The NEFI has had this opportunity during the

course of this extended proceeding and has not rebutted the presumptions nor presented substantial evidence that would cause the Administrator to deny this import application. In contrast, the ERA finds substantial evidence in the record that indicates that Granite State's import proposal is competitive and therefore in the public interest. Further, although critical of the application and results of the import policy, the NEFI has never attacked the substantive bases for the policy, as articulated in the guidelines.

The NEFI repeats throughout its rehearing request one particular argument not addressed earlier in this proceeding. The NEFI argues that the two-part rate proposed by Granite State will result in a competitive supply of gas only at a 100 percent load factor. This is the equivalent of a 100 take requirement, the NEFI claims, and thus "conflicts with the flexible market pricing" necessary to support any presumptions of competitiveness and need.

The ERA remains unconvinced by the NEFI's arguments and selective use of data that the proposed import is only competitive at a 100 percent load factor. The two-part rate structure is not unique and is found in many gas purchase contracts. Furthermore, the NEFI's argument ignores or misinterprets the ERA policy. The policy guidelines emphasize that pricing considerations, by themselves, do not determine the competitiveness of a proposed import. The ERA considers the import proposal as a whole and uses a more meaningful test of competitiveness that examines the method used in determining the base price and whether the proposed import arrangement contains sufficient flexibility to adapt to changes in the marketplace over the term of the project. The NEFI provides no information to suggest that provisions in the gas purchase contract between Granite State and Shell Canada, such as the monthly price adjustment and the annual price renegotiation clause, would not operate to ensure that this natural gas supply will be competitive over the entire import term. It should be noted that under the price renegotiation clause in the gas purchase contract, the two-part, demand/commodity rate structure is also subject to future change. Furthermore, if renegotiation is not successful, either party can invoke arbitration "to achieve a price . . . that is competitive with and comparable to the prices of major competing energy sources in the markets served by Buyer."

### III. Conclusion

The ERA has determined that the NEFI's application for rehearing presents no information that would merit reconsideration of our findings in Opinion No. 187. Accordingly, this order denies the NEFI's request for rehearing.

## ORDER

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

The application for rehearing of DOE/ERA Opinion and Order No. 187 submitted by the New England Fuel Institute is hereby denied.

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

--Footnote--

1/ Granite State Gas Transmission, Inc., 1 ERA Para. 70,717.