UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

ECONOMIC REGULATORY ADMINISTRATION

TEXAS EASTERN TRANSMISSION CORPORATION	)	ERA DOCKET NO. 87-37-NG

ORDER APPROVING AN AMENDMENT TO
AN AUTHORIZATION TO IMPORT NATURAL GAS
FROM CANADA AND GRANTING INTERVENTIONS

DOE/ERA OPINION AND ORDER NO. 202

OCTOBER 30, 1987

I. BACKGROUND

On July 14, 1987, Texas Eastern Transmission Corporation (Texas Eastern) 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 Texas Eastern in DOE/ERA Opinion and Order No. 32 (Order 32),[1/] as amended by DOE/ERA Order No. 112 (Order 112), ERA Docket No. 85-13-NG.[2/] Order 32 authorized Texas Eastern to import up to 75,000 Mcf of natural gas per day from ProGas Limited (ProGas) of Calgary, Alberta, Canada through October 31, 1987, at a price not to exceed $4.94 (U.S.) per Mcf. The volumes imported entered the U.S. via the import point near Emerson, Manitoba, and were transported through the pipeline facilities of Great Lakes Transmission Company to the facilities of ANR Pipeline Company (ANR) at an existing delivery point near Farwell, Michigan. ANR then delivered the gas to Texas Eastern.

Order 112 granted Texas Eastern's request to import the gas previously authorized for import by Order 32 in accordance with the terms of a May 30, 1985, amending agreement between Texas Eastern and its Canadian supplier, ProGas. Order 112 also deferred action on Texas Eastern's request to extend the term of

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1/ 1 ERA ¶70,530. Order 32 also applied to Tennessee Gas Pipeline Company, Natural Gas Pipeline of America, and Michigan Wisconsin Pipe Line Company (now ANR Pipeline Company). This application deals solely with the volumes imported by Texas Eastern and does not affect the other three ProGas customers covered in Order 32.

2/ Texas Eastern Transmission Corporation, 1 ERA ¶70,634 (March 21, 1986).

its existing authorization through October 31, 1989, and consolidated that request, for purposes of requesting additional comments, with Texas Eastern's separate requests to import Canadian gas in ERA Docket Nos. 82-05-NG, 82-07-NG, and 85-19-NG. In a procedural order issued concurrently with Order 112 on March 21, 1986,[3/] the ERA directed Texas Eastern to file additional information with respect to all four dockets to show that the imports proposed would be competitive and marketable, but indicated that decisions would be rendered separately on the four import applications. On May 29, 1986, the ERA granted Texas Eastern an indefinite extension of time in which to provide information showing that the proposed imports would be competitive and market responsive.

Texas Eastern's current application withdraws that portion of the application in ERA Docket No. 85-13-NG which sought an extension of Texas Eastern's existing import authorization through October 31, 1989, and requests an extension of that authorization through October 31, 2000, based on a new gas sales agreement with ProGas dated November 1, 1986, as amended on July 9, 1987. The application also seeks authorization to import authorized gas that, if not needed for system supply, would be released to Texas Eastern's and/or ProGas' U.S. marketer for sale on the spot market pursuant to a special marketing agreement executed with ProGas on November 1, 1986. Gas sold under the

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3/ ERA Docket Nos. 85-13-NG, *et al*.

special marketing agreement over the term of the import arrangement would consist of gas imported by Texas Eastern to meet system supply contract demand that is not taken by firm customers for any reason and is thereby made available for sale at freely negotiated, competitive prices by Texas Eastern's and/or ProGas' marketing affiliate.

Under the new Texas Eastern/ProGas sales agreement, Texas Eastern would purchase gas from ProGas under a price determination formula which provides that ProGas' monthly demand charges to Texas Eastern would consist of the demand charges of TransCanada PipeLines Limited (TransCanada), NOVA, an Alberta Corporation, and ProGas, reduced to comply with the provisions of Federal Energy Regulatory Commission (FERC) Opinion Nos. 256 and 256-A[4/] by an "MDR adjustment" provided for in the Texas Eastern/ProGas contract. The MDR adjustment consists of the difference between the demand charges of TransCanada, NOVA and ProGas and the portions thereof which the FERC has permitted, in Opinion No. 256 and 256-A, to be passed through on an as-billed basis into Texas Eastern's demand rates. This formula would result in a monthly demand charge to Texas Eastern as of

4/ FERC Opinion Nos. 256 and 256-A denied as-billed passthrough of Canadian gas costs and required the importing pipeline to reallocate some costs from the demand charge to the commodity charge. Natural Gas Pipeline Company of America, (Opinion No. 256), 37 FERC ¶61,215 (December 8, 1986) and Natural Gas Pipeline Company of America, (Opinion No. 256-A), 39 FERC ¶61,218 (May 27, 1987).

August 1, 1987, of $11.417 (U.S.) per MMBtu of the daily contract quantity, reduced by the MDR adjustment to $9.5689 (U.S.) per MMBtu.

The price determination formula further provides that the commodity charge for the gas at the border shall be an amount equal to the commodity charge per MMBtu in Texas Eastern's daily contract quantity rate schedule on file and in effect at the FERC for system supply customers in rate zone C, less an amount equal to the transportation charges for moving the gas from the international border to rate zone C. A separate, non-gas commodity charge is provided for consisting of one-half of the demand charges which cannot be passed through as-billed under FERC Order Nos. 256 and 256-A, i.e., one-half of the MDR adjustment. This formula results in a delivered commodity rate for the gas in rate zone C as of August 1, 1987, of $1.8812 (U.S.) per MMBtu and a border commodity rate of $1.76 (U.S.) per MMBtu.

In addition, the price determination formula provides that ProGas' monthly demand charge will be subject to adjustment for changes in the demand charges of NOVA, TransCanada, and in ProGas' fixed costs. The commodity charge is subject to adjustment for each change in Texas Eastern's commodity charge for firm sales in rate zone C and for changes in the charges for transporting the gas from the international border to Texas Eastern's pipeline system. Except for the MDR adjustment to conform ProGas' demand charge to FERC Opinion Nos. 256 and 256-A, the price of the imported gas may be renegotiated annually, or upon 15 days notice, when changes in market responsive prices occur in Texas Eastern's gas purchase contracts for system supply, when ProGas makes a new PGA filing at the FERC, or when other changes in market or regulatory conditions occur that warrant price redetermination. The price provisions are also subject to renegotiation after a final decision has been rendered in the U.S. appellate courts on the merits of FERC Opinion Nos. 256 and 256-A, and if the quantity of gas Texas Eastern takes under the 1986 gas sales agreement as amended falls below 50 percent of the annual contract quantity.

Under the new Texas Eastern/ProGas gas sales agreement, Texas Eastern is required to purchase a minimum annual quantity of gas. The minimum annual quantity is based on the daily contract quantity of 75,000 Mcf of natural gas, reduced as necessary to maintain the same ratio of takes to total contract volumes available during the contract year as exists between Texas Eastern's U.S. takes and total contract volumes available under contracts with U.S. suppliers having a primary term of more than three years. Credit is given in meeting Texas Eastern's minimum annual contract quantity requirement for gas sold under the special marketing agreement at the rate of one cubic foot for each two cubic feet sold until Texas Eastern's purchases have reached 50 percent of daily contract quantity and one cubic foot for each cubic foot sold under the special marketing agreement thereafter. Credit is also given against the demand charges which Texas Eastern must pay to ProGas with respect to Texas Eastern's daily contract quantity of 75,000 Mcf of gas based on the purchase prices paid to Texas Eastern by Texas Eastern's and/or ProGas' U.S. marketer for the special marketing gas.

In support of its application, Texas Eastern asserts that the price adjustment and renegotiation provisions of the new gas sales contract provide the necessary flexibility so that the imported gas will remain competitive throughout the term of the authorization requested. According to Texas Eastern, tying ProGas' commodity charge to Texas Eastern's commodity charge for firm sales in rate zone C will adjust ProGas' commodity charge to changes in the costs of Texas Eastern's domestically purchased gas supply and thereby help ensure that the price of the imported gas in comparable to that of major energy sources, including natural gas, competing in Texas Eastern's market area. Further, Texas Eastern urges that the annual and market-driven renegotiation of the pricing provisions in the new gas sales contract also will help ensure the competitiveness of the imported gas in the markets served. As for gas sold under the special marketing agreement, Texas Eastern states that such gas will be sold only at freely negotiated, competitive prices and indicates that the sale of such gas is an integral part of the long-term import of natural gas for Texas Eastern's system supply which will help to protect firm customers from minimum take and demand charge liabilities for contract demand gas not taken. Texas Eastern also states that the sale of gas under the special marketing agreement is consistent with the implementation of the FERC's Order No. 436[5/] program. Prospective marketers making purchases under the special marketing agreement would be able to use Texas Eastern's pipeline transportation facilities, and all sales made pursuant to this agreement would earn demand charge credits under the Texas Eastern/ProGas sales contract.

Texas Eastern contends that need for the gas is demonstrated by the fact that gas purchased under the new gas agreement and under the special marketing agreement will be competitive in the markets served and that recent levels of gas purchases from ProGas have been near 100 percent of contract quantity for system supply. With respect to security of supply, Texas Eastern asserts that ProGas has been an historically reliable supplier, and that although the daily contract quantity of up to 75,000 Mcf per day of natural gas may be reduced by up to 20 percent each year if TransCanada exercises an option which TransCanada has to

5/ FERC's Order No. 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 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 ¶30,665. On June 23, 1987, the U.S. Court of Appeals for the District of Columbia Circuit, vacated Order 436 and remanded it to the FERC. Associated Gas Distributors v. FERC, No. 85-1811, slip op. (D.C. Cir. June 23, 1987). On August 7, 1987, the FERC issued Order No. 500 establishing an interim rule and statement of policy in response to the court's remand; it became effective September 15, 1987.

purchase certain quantities of gas from ProGas, TransCanada has never exercised this option. Accordingly, Texas Eastern expects that contract volumes will be available throughout the term of the amended authorization requested.

II. PROCEDURAL HISTORY

The ERA issued a notice of Texas Eastern's application to amend its existing authorization on August 24, 1987,[6/] inviting protests, motions to intervene, or comments to be filed by October 2, 1987. The ERA received nine motions to intervene.[7/] Six of the intervenors did not comment on the application, ProGas intervened in support of the application, and two intervenors, Northridge and Producers opposed the application. Answers to the comments received from Northridge and Producers were filed by Texas Eastern and ProGas. This order grants intervention to all movants.

6/ 52 FR 33266, September 2, 1987.

7/ The intervenors are: Tennessee Gas Pipeline Company, a Division of Tenneco, Inc., El Paso Natural Gas Company, Columbia Gas Transmission Corporation, Municipal Defense Group, Great Lakes Gas Transmission Company (Great Lakes), Public Service Electric and Gas Company, ProGas, Northridge Petroleum Marketing, Inc. (Northridge) and jointly by eleven producer associations (hereinafter called Producers): Independent Petroleum Association of America, California Independent Producers Association, Energy Consumers and Producers Association, Independent Oil & Gas Association of New York, Inc., Independent Petroleum Association of Mountain States, North Texas Oil and Gas Association, Panhandle Producers and Royalty Owners Association, West Central Texas Oil and Gas Association, Independent Petroleum Association of New Mexico, East Texas Producers & Royalty Owners Association, and Permian Basin Petroleum Association.

III. DECISION

Texas Eastern'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 is a finding that the import "will not be consistent with the public interest." 8/ In making this finding, the ERA Administrator is guided by the DOE's natural gas import policy guidelines. 9/ Under this policy, the competitiveness of the import arrangement in the markets served is the primary consideration for meeting the public interest test. Under a long-term import proposal, need for the gas supply and security of supply are also important considerations.

A. SUBSTANTIVE ISSUES

(1) Competitiveness of the Import

Producers, arguing in opposition to the import arrangement, contend that prices which ProGas may charge to Texas Eastern are anti-competitive in that they guarantee a higher price for the gas than market conditions warrant. According to Producers, ProGas' gas commodity charge by definition under the pricing formula, will recover more than Texas Eastern's average weighted cost of gas, including certain non-gas costs such as return of equity and allowances for taxes. In addition, Producers argue that both ProGas and Great Lakes will impose minimum bill requirements on Texas Eastern which are anti-competitive and that the proposed import may cause Texas Eastern to incur

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8/ 15 U.S.C. §717(b).

9/ 49 FR 6684, February 22, 1984.

take-or-pay liabilities under its contracts with domestic suppliers that firm customers would have to absorb. Producers also contend that ProGas' two-part demand/commodity rate creates an unfair competitive advantage with respect to domestic Producers who must use a one-part commodity rate.

Producers' contention that the proposed pricing formula is anti-competitive is not supported by the record. Producers have apparently misread the Texas Eastern/ProGas sales contract. ProGas' gas commodity charge does not, as contended by Producers, recover non-gas commodity charges by definition, but rather such costs are specifically excluded in the pricing formula from ProGas' gas commodity charge. Producers, therefore, have not provided any rationale basis for their conclusion that ProGas' gas commodity charge would recover more than the Texas Eastern's weighted average cost of gas or that the pricing formula would operate in an anti-competitive fashion.

With respect to the take-or-pay liabilities issue, Texas Eastern states that it has not incurred any take-or-pay liabilities and does not expect to do so in the future as a result of its import of Canadian gas from ProGas. In the absence of any information in the record showing that Texas Eastern has or will incur take-or-pay liabilities, as suggested by Producers, the ERA concludes that Producers' comments in this regard are speculative and do not support an inference that the proposed import would not be competitive for this reason.

Further, although the Texas Eastern/ProGas' sales contract does contain a minimum bill provision, the sales contract provides that the minimum annual quantity that Texas Eastern must take from ProGas will be automatically and proportionately reduced if Texas Eastern's overall system demand needs are reduced, i.e., Texas Eastern will never have to take proportionately more gas from ProGas than it is currently taking from domestic suppliers. In addition, credit would be given against Texas Eastern's minimum bill obligations to ProGas for gas not taken by firm customers but nevertheless sold by Texas Eastern's and/or ProGas' U.S. marketer on the spot market. Accordingly, the ERA concludes that Texas Eastern's minimum bill obligations to ProGas will not significantly affect the competitiveness of the proposed import arrangement. Any minimum bill that Great Lakes may impose on Texas Eastern for transportation of the imported gas is a matter for the FERC to evaluate.[10/] Neither the NGA nor ERA regulations limit the ERA's authority to approve an import application to cases in which the FERC has already certificated downstream transportation arrangements.[11/]

As for ProGas' two-part, demand/commodity rate, the ERA has consistently approved such rate structures for imported gas since they are used by domestic pipeline suppliers of gas and reflect

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10 Approval of Texas Eastern's arrangements with Great Lakes for transportation of the imported gas is now pending before the FERC in Great Lakes Gas Transmission Company, FERC Docket No. CP87-467-000, *et al*.

11/ Bonus Energy, Inc., 1 ERA ¶70,691 (March 24, 1987).

and serve legitimate ratemaking concerns. Moreover, no convincing evidence has been presented that domestic suppliers would be discriminated against or significantly disadvantaged by ProGas' two-part rate.

The ERA observes that the Texas Eastern/ProGas sales contract contains both price adjustment and price renegotiation provisions that provide flexibility to the import arrangement. Specifically, the contract provides for adjustment of the commodity charges to be paid to ProGas to reflect changes in Texas Eastern's commodity charge for firm sales in rate zone C for gas purchased from domestic sources and to reflect changes in the cost of transportation from the international border. The contract also provides for annual renegotiation of the pricing provisions and for price renegotiation upon 15 days notice by either party when charges in market or regulatory conditions occur that warrant price redetermination. These provisions, together with the provision for reduction in minimum take requirements previously noted, should ensure the competitiveness of the proposed import. The ERA therefore finds that the proposed import is competitive and is likely to remain so in the market served during the term of the import arrangement.

(2) Need

Both Producers and Northridge, in opposing the application, argue that Texas Eastern has not met the burden of proof for showing that the gas is needed for system supply. Producers argue that the application should be dismissed because need for the gas cannot be determined because of unrest and turmoil in the natural gas market and have attached a statement by David W. Wilson[12/] who expresses his opinion that in general Canadian gas is not needed in U.S. markets. Both Producers and Northridge cite Texas Eastern's proposal to sell gas imported for but not taken by system supply customers on the spot market as evidence that the imported gas is not needed.

Under the DOE guidelines, need is viewed as a function of competitiveness, and the gas is presumed to be needed if it is found to be competitive in the proposed market. In this case, the proposed gas import is competitive and therefore the gas is presumed to be needed. Moreover, the proposed import is a revision of a long-term import arrangement originally established to serve Texas Eastern's system supply beginning in 1981. The arrangement has served Texas Eastern's system supply requirements for six years and is expected to continue to do so over the extended term of the import authorization requested.

If Producers' rebuttal argument that need cannot be determined because of "unrest and turmoil" in the market were

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12/ Mr. Wilson is President of Gas Acquisition Services, Inc.

accepted, the ERA could be prevented from authorizing imports whenever the market is in transition. The comments by Mr. Wilson cited by Producers reflect his opinion that Canadian gas generally is not needed in U.S. markets; but they appear to be in the minority[13/] and do not address need for imported gas under the criteria established in the guidelines under which need for an import proposal is evaluated in terms of the competitiveness in the particular markets to be served. Further, the fact that Texas Eastern's proposed import arrangement provides for sale of gas imported but not taken by system supply customers on the spot market is not evidence that the gas is not needed. Texas Eastern's purpose is to enhance the competitiveness of the import and to protect firm customers from absorbing costs for gas not taken. To conclude that this objective shows lack of need for gas would discourage prudent contractual arrangements that protect not only the parties but the ratepayers affected as well. Thus, based on the evidence in the record, and the failure of Producers and Northridge to rebut the presumption of need, the ERA finds that there is need for the proposed import.

13/ Evidence of the general view that Canadian gas is needed in U.S. markets is found in Energy Information Administration, "Annual Energy Outlook 1986, DOE/ERA-0383(86) (February 11, 1986)," Table 7, Comparison of Base Case Energy Supply and Disposition Projections for 1985 and 2000, at 23.

(3) Security of Supply

ProGas' historical reliability as a supplier spanning several years, and the fact that TransCanada has never exercised its option to purchase certain volumes of gas from ProGas that could reduce daily contract quantity by up to 20 percent each year, demonstrates that the gas supply for the import proposal is secure. Further, no party has provided any evidence to refute Texas Eastern's assertion that it expects the full daily contract quantity to be available over the term of the authorization requested. Accordingly, the ERA concludes that security of supply has been established.

(4) The Special Marketing Agreement

Both Producers and Northridge contend that Texas Eastern's request for authorization to import gas that, if not taken by system supply customers, would be sold on the spot market pursuant to the Texas Eastern/ProGas special marketing agreement is in effect a request for a long-term blanket import authorization contrary to the ERA's policy of limiting such authorizations to a two-year period. Northridge also argues that the Texas Eastern proposal improperly combines a request for a long-term import authorization for firm customers with a request for a 13-year blanket authorization for spot market sales by Texas Eastern's and/or ProGas' marketers. According to Northridge, not only does it exceed the two-year limit which the ERA has imposed on such authorizations, it also duplicates authorizations which these marketers already have and provides an unfair advantage to these marketers vis-a-vis Northridge in marketing gas supplies in the U.S. spot markets. Both Northridge and Producers suggest that the marketers would actually be importing the gas contrary to Section 3 of the NGA which requires the holder of the authorization to import the gas.

The ERA recognizes that Texas Eastern's proposal for the sale of gas imported for but not taken by system supply customers is designed to enhance the overall competitiveness of the import arrangement and to provide firm customers some measure of protec- tection from having to absorb demand and minimum take costs that might arise if system supply takes decline for any reason. As such, as Texas Eastern contends, the special marketing arrangement is a functional part of the proposed long-term import arrangement and does not duplicate other blanket authorizations issued to ProGas' and/or Texas Eastern's U.S. marketer, since Texas Eastern would be the importer, not the marketers. Nevertheless, the practical effect of Texas Eastern's request for approval of this arrangement is that of a long-term blanket import authorization. Therefore, as we did in DOE/ERA Opinion and Order No. 131 14/ with respect to an analogous special marketing proposal by the Tennessee Gas Pipeline Company, we are imposing a two-year limit on the term of such sales to guard against unanticipated and unintended consequences from the blanket-type authorization. The ERA still considers this to be an important condition. Texas Eastern has not offered any sufficiently compelling reason to cause us to diverge from

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14/ Tennessee Gas Pipeline Company, 1 ERA ¶70,654 (June 19, 1986).

this policy. It is acknowledged, however, that changing market conditions may make it appropriate to revisit the two-year limit on blanket authorizations at a future time.

Although we are limiting this portion of the authorization granted to a two-year period, we believe that the flexibility in Texas Eastern's marketing arrangements can be accommodated by an application for an extension(s) of the blanket portion of the authorization granted. Assuming that blanket authorizations operate as envisioned, Texas Eastern may request and receive an extension of the two-year authorization for sale of gas on the spot market under the special marketing agreement. In view of our decision to limit special marketing sales to a two-year period, the questions raised by Northridge concerning an alleged competitive advantage to Texas Eastern's and/or ProGas' marketer are moot.

(5) Other Issues

Producers raise several other objections that have been raised in one form or another in previous ERA proceedings and before the D.C. Circuit Court of Appeals and denied there.[15/] We therefore discuss them only briefly.

15/ Panhandle Producers and Royalty Owners Association v. Economic Regulatory Administration, 822 F.2d 1105 (D.C. Cir., June 30, 1987); Bonus Energy, Inc., 1 ERA ¶70,691 (March 24, 1987); Tennessee Gas Pipeline Company, 1 ERA ¶70,6074 (November 6, 1986); Western Gas Marketing U.S.A., Ltd., 1 ERA ¶70,675 (November 6, 1986); Enron Gas Marketing Inc., 1 ERA ¶70,676 (November 6, 1986); and Minnegasco, Inc., 1 ERA ¶70,721 (September 21, 1987).

First, Producers contend that the DOE policy guidelines cannot be relied upon either as a substantive rule or as a statement of policy. In the context of this argument, Producers also claim that the Secretary failed to comply with Section 404 of the Department of Energy Organization Act (DOE Act) when the guidelines were promulgated. As in prior cases,[16/] the ERA emphasizes that the DOE policy guidelines are discretionary guidance for the Administrator, not a rule, and do not bind the Administrator in deciding cases. Each case ultimately is decided on the facts and record of the individual proceeding. Further, the contention that in some unspecified way, the Secretary did not comply with Section 404 of the DOE Act adds no merit to Producers' objection. Section 404 provides for mutual consultation between the ERA and the FERC on certain Secretarial matters of intra-agency concern. The FERC was an active participant in the development of the DOE guidelines and, since their issuance, has consistently acknowledged and followed them.

Second, Producers contend that the ERA must consider the dampening effect of the proposed import on domestic drilling and the domestic gas industry. As the ERA has observed in prior ERA proceedings,[17/] the evidence submitted by Producers on domestic rig counts and the allegation that imported gas enjoys superior and unequal access to domestic transportation and markets, are not persuasive. U.S. Producers and Canadian suppliers of gas are

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16/ Id.

17/ Id.

treated equally under the FERC's Order No. 436 (now Order 500) open-access program and there is no evidence that either sector's rig count or other activities have suffered any generic benefit or detriment from relationships under the FERC rule or that the other sector has been discriminated against. Both sectors are disadvantaged by lack of open access to pipeline transportation. Moreover, the marketing difficulties of domestic producers have been caused, not by Canadian imports, but rather by the interaction of numerous economic forces, including the leveling off of U.S. demand and significantly reduced oil prices.

Third, Producers contend that the ERA should require the imported gas to be transported over open-access pipelines. As in previous cases, the ERA concludes that to require imported gas to be transported over open-access pipelines would unfairly discriminate against foreign supplies and lessen competition.[18/]

Fourth, since the proposed import involves gas volumes which, when added to other volumes requested in applications pending before the ERA or already authorized, exceed available pipeline capacity, the ERA should consider Texas Eastern's application as an application competing with other applications under Ashbacker Radio Corp. v FCC.[19/] In making this assessment,

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18/ *Id.*

19/ 326 U.S. 327 (1945).

Producers also contend that the ERA must consider how available capacity at border facilities should be allocated between this proposed import and other proposed and approved import volumes. As stated in prior cases,[20/] authorizations to import gas 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 provide them with this opportunity. Market forces, not regulatory intervention, will allocate available pipeline capacity efficiently and economically.

No new information has been presented in this docket to show that any of the foregoing issues should be treated differently here than in prior cases. We therefore deny these objections by Producers without further discussion.

B. OTHER MATTERS

(1) Request For Summary Dismissal

Producers request that the ERA reject Texas Eastern's application as deficient on the grounds that the applicant has failed to meet its burden of proof to show a need for the

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20/ *See supra* note 15.

proposed import of gas. As previously concluded in Section IIIA(2) of this Opinion, it is clear from the record in this proceeding that the presumption that the gas is needed has not be rebutted by the information of record. Producers request for summary dismissal of the application is therefore denied.

(2) Request For Conditions

Producers request that the ERA attach several conditions to any import authorization granted to Texas Eastern. First, Producers request that any import authorization granted be conditioned upon Texas Eastern and any other pipeline transporting the imported gas becoming an open-access transporter under FERC Order No. 500 for the duration of the import. As discussed above and in several previous cases[21/] in which the open-access condition has been requested, such a condition would discriminate against foreign gas supplies vis-a-vis domestic gas and lessen competition, and is therefore inconsistent with the public interest. Accordingly, Producers' request is denied.

Second, Producers request that any import authorization granted be conditioned upon elimination of ProGas' two-part rate. As previously noted in this Opinion, the ERA has consistently

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21/ *See supra* note 15.

approved two-part demand/commodity rate structures for imported gas since they are used by domestic pipeline suppliers of gas and serve legitimate ratemaking concerns. Moreover, Producers have provided no convincing evidence that domestic producers would be discriminated against or significantly disadvantaged by ProGas' two-part rate. Accordingly, Producers' request is denied.

Producers also request that any import authorization granted be conditioned upon Texas Eastern obtaining a certificate authorization from the FERC for transportation service and upon service commencing by a date certain. As previously stated in this Opinion, neither the NGA nor ERA regulations limit the ERA's authority to approve an import application to applications where the FERC has already approved downstream transportation arrangements. Clearly, in this case, where extension of an authorization is being requested, the gas could not continue to flow unless effective transportation arrangements have been certified. Accordingly, the Producers' request for this condition is denied.

(3) Requests For Additional Procedures

1. Trial-Type Hearing

Producers request a trial-type hearing to address their list of allegedly disputed issues of fact. These issues include: (1) whether the proposed import has a dampening effect upon domestic drilling, and the domestic natural gas industry; (2) how import authorizations should be allocated under Ashbacker, Radio Corp. v F.C.C.,[22/] since the volumes already authorized for import exceed the physical capacity of border facilities; (3) the consistency of blanket import authorizations with national security objectives that Section 3 of the NGA is designed to protect; (4) security of supply; (5) the identity of the parties to the proposed import; (6) the competitiveness of the import; (7) whether the proposed import will hinder competition by forstalling the need for transporting pipelines to become an Order No. 500 transporter; (8) how available capacity at border facilities should be allocated between this authorization and other approved and proposed import volumes; (9) whether domestic gas is available at lower prices; and (10) how available capacity at border facilities should be allocated [Producers have duplicated items (2) and (8) in their list of alleged disputed issues of fact].

Section 509.313 of the ERA's administrative procedures requires any party filing a motion for a trial-type hearing to demonstrate that there are factual issues genuinely in dispute, relevant and material to the decision and that a trial-type hearing is necessary for a full and true disclosure of the facts. No party is entitled as a matter of right to a trial-type hearing for policy or legal issues.

The ERA has examined the issues raised by Producers in requesting a trial-type hearing and concludes that however

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22/ See supra note 19.

characterized by Producers, their concerns revolve primarily around the issue of competitiveness. Their concerns reflect a different policy perspective, not a factual dispute regarding competitiveness, and depart fundamentally from established DOE policy to promote competition in the public interest.

The ERA does not believe that Producers have demonstrated that further illumination of the issues would be aided materially by additional procedures nor that a trial-type hearing is necessary to assure the adequacy of the record or the fairness of this proceeding. All parties, including Producers, have had sufficient opportunity to comment on the proposed arrangement and the parties positions on the issues, and any facts presented to support those positions are adequately represented in the record and provide ERA with a sufficient basis on which to make a decision. Accordingly, the ERA has determined that it would not be in the public interest to hold additional procedures, including a trial-type hearing, and Producers' request is therefore denied.

2. Requests For Discovery

Producers also request the ERA to authorize the conduct of discovery to obtain information from the parties to this proceeding regarding: (1) the identify of the parties to Texas Eastern's import proposal, (2) the competitive effects of the proposed import on domestic producers; and (3) data as to the reasonableness of Texas Eastern's claim that the imported gas in needed and cannot be supplied more economically from domestic sources.

With respect to the first discovery request, the ERA notes that the parties to the proposed extension of Texas Eastern's long-term import authorization have clearly been identified. With respect to the related blanket authorization requested, all of the parties and the markets to be served have not been identified because they are not yet known, a fact that is true with respect to blanket import proposals generally.[23/] Thus, Producers have identified no information which discovery could conceivably uncover, and therefore this discovery request is denied.

With respect to the second and third discovery request, Producers have made no showing that there is relevant information in the possession of the parties, not already available to them in the record or from other public sources, that granting of discovery could uncover. The ERA also notes that Producers have not identified any specific item in the possession of a party that Producers wish to obtain by discovery relating to competitiveness or need, nor have they asked any party to voluntarily provide information which Producers may desire to have. Accordingly, Producers' second and third requests for discovery are denied.

(4) Environmental Determination

Producers allege that the ERA must prepare an environmental assessment with respect to the import proposal even though the

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23/ See supra note 15.

proposal does not involve the construction of new facilities. The National Environmental Policy Act of 1969 (NEPA),[24/] requires the ERA to give appropriate consideration to the environmental effects of the proposed action such as an authorization to import gas; it does not require the ERA to prepare an EIS. The ERA has reviewed the environmental effects of authorizing the proposed import and has concluded that approval of the proposal clearly would not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and therefore, no EIS or additional assessment is required.

C. CONCLUSION

After taking into consideration all of the information in the record of this proceeding, I conclude that the extension of the long-term authorization requested by Texas Eastern for its system supply would serve consumer interests in providing natural gas supplies at market-responsive prices. It is noted that the only opposition to the import proposal comes from current and potential suppliers in competition for customers in the markets to be served. Therefore, I find that granting the long-term

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24/ 42 U.S.C. 4321, *et seq*.

portion of the authorization requested is not inconsistent with the public interest and should be granted.

However, we are denying Texas Eastern's request for blanket authorization to sell natural gas under the special marketing agreement for the term of the related long-term import authorization granted. Nevertheless, authorization to import natural gas for sale on the spot market under the special marketing agreement is granted for a two-year term without prejudice to any subsequent request(s) for extension of such authorization that Texas Eastern may wish to file. To be consistent with previous authorizations, the term of the blanket authorization will commence on date of first delivery rather than on approval of the application.

ORDER

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

A. DOE/ERA Opinion and Order No. 32, issued to Texas Eastern Transmission Corporation (Texas Eastern) on April 24, 1981, as amended by DOE/ERA Opinion and Order No. 112 on March 21, 1986, is hereby further amended to extend its term until October 31, 2000, in accordance with the provisions of the November 1, 1986, agreement between Texas Eastern and its Canadian supplier, ProGas Limited, as amended on July 9, 1987, and made a part of Texas Eastern's import application filed with the ERA on July 14, 1987.

B. Within the authorization granted in Ordering Paragraph A to import up to 75,000 Mcf per day, Texas Eastern may release imported gas not needed to meet Texas Eastern's system supply contract demand as "Special Purchase Gas" for purchase and sale by ProGas' and/or Texas Eastern's marketer to third parties in the spot market for a period of two years from the date of the first such sale.

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

D. With respect to the imports authorized by this Order, Texas Eastern shall file with the ERA within 30 days following each calendar quarter, quarterly reports indicating: (1) for purchases made under the Texas Eastern/ProGas sales contract, by month, the quantities of the gas in MMcf imported by Texas Eastern and the average price, showing the demand/commodity charge breakdown on a monthly and per unit (MMBtu) basis paid for those volumes at the international border, and (2) separately for transactions under the Texas Eastern/ProGas special marketing agreement: whether sales of imported gas have been made, and if so, giving, by month, the total MMcf of the imports and the average purchase price per MMBtu at the border. These second reports shall also provide the details of each transaction, including the names of the sellers and purchasers, estimated or actual 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, or any take-or-pay make-up provisions.

E. The requests by Independent Petroleum Association of America, California Independent Producers Association, Energy Consumers and Producers Association, Independent Oil & Gas Association of New York, Inc., Independent Petroleum Association of Mountain States, North Texas Oil and Gas Association, Panhandle Producers and Royalty Owners Association, West Central Texas Oil and Gas Association, Independent Petroleum Association of New Mexico, East Texas Producers & Royalty Owners Association and Permian Basin Petroleum Association for dismissal of Texas Eastern's application, a trial-type hearing, imposition of a condition requiring all gas imported under this authorization to be transported only by open-access transporters, approval of transportation arrangements by the FERC under FERC Order No. 500, elimination of ProGas Limited's two-part rate, and for discovery are denied.

F. 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 October 30, 1987.

Marshall A. Staunton
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Administrator
Economic Regulatory Administration