Cited as "1 ERA Para. 70,738"

Minnegasco, Inc. (ERA Docket No. 86-61-NG), November 20,1987.

DOE/ERA Opinion and Order No. 191-A

Order Denying Rehearing

I. Background

On September 21, 1987, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 191 (Order 191) 1/ in ERA Docket No. 86-61-NG, granting Minnegasco, Inc. (Minnegasco) authority to import up to 160,000 Mcf per day of Canadian natural gas over a ten-year period. Under Order 191, Minnegasco would be able to import Canadian gas directly from TransCanada PipeLines Limited (TransCanada) as a second source of supply which would compete with Minnegasco's primary supplier, Northern Natural Gas Company, a Division of Enron Corporation (Northern). Minnegasco currently purchases all of its firm, long-term gas supplies from Northern.

A joint motion to intervene by ten producer associations (Producers) 2/ opposed the application,3/ requesting summary dismissal, or alternatively, requesting that the ERA either hold a trial-type hearing or impose conditions on the authorization that would require: (1) any gas imported under the authorization to be transported through pipelines providing open access under the Federal Energy Regulatory Commission's (FERC) Order No. 436 Program; 4/ elimination of TransCanada's two-part rate; and (3) limiting the authorization to approval of the pricing mechanism presented in the application with subsequent revisions to be subject to prior ERA approval. Producers also filed two requests for discovery alleging that additional information from the parties was needed regarding: (1) the cost basis of TransCanada's demand charge; (2) the competitive effects of the proposed import on domestic producers; (3) need for the imported gas supplies; and (4) "the relevant contracts with Western Gas Marketing U.S.A. Limited (WGML) and the transporters" in order to be able to prepare meaningful comments on Minnegasco's proposed pricing formula. Producers' opposition to the proposed import is premised on their concern over the alleged negative impact on domestic producers of competition from Canadian imports which, they contend, receive unequal delivery access to domestic markets, and that the gas is not needed, is anticompetitive and would have an unfair competitive advantage over domestic supplies because of the proposed two-part demand/commodity rate structure contained in the Minnegasco/TransCanada gas purchase contract. Order

191 denied Producers' request for summary dismissal of the application, a trial-type hearing, imposition of conditions on the authorization, and for discovery in approving Minnegasco's application to import natural gas.

Producers filed an application for rehearing of Order 191 on October 21, 1987. The application also seeks a stay of the order "pending rehearing and the outcome of any judicial review of any ERA order on rehearing." Producers represent the interests of independent producers and royalty owners in California, Kansas, New Mexico, New York, Oklahoma, Texas and the Rocky Mountain area. A joint answer to Producers' request for a stay was filed by WGML and Minnegasco on November 5, 1987.

In support of their request for rehearing, Producers argue that the ERA erred in:

(1) relying on the DOE natural gas policy guidelines 5/ in making its determination; (2) assigning the burden of proof to the Producers; (3) failing to assess the need for the imported gas; (4) failing to conform to the Secretary's recent findings regarding the lack of competitive domestic markets; 6/ (5) approving TransCanada's anti-competitive border price formula; (6) failing to assess the anti-competitive effects of the order and to provide for conditions to protect against long-term harm to domestic supplies; (7) failing to follow its own regulations during the proceedings regarding the information required in the record to permit adequate discussion of the applicant's proposal; (8) failing to conduct the evidentiary hearing requested by Producers; (9) failing to permit discovery of facts central to the ERA's determinations; (10) failing to conduct an environmental assessment, and to otherwise meet the requirements of the National Environmental Policy Act of 1969 (NEPA); 7/ and in (11) failing to consider the relative merits of this application with the alternative of transporting the imported natural gas over the existing pipeline facilities of Northern Border Pipeline Company and Northern.

In support of their request for a stay, Producers argue that the ERA may grant a stay upon a finding that "that justice so requires" and that if a stay is not granted, Minnegasco will import natural gas to the detriment of continued exploration and development of domestic reserves. Producers also argue that Northern will incur substantial take-or-pay obligations and fixed costs which will have to be borne by Northern's other customers or netbacked to Producers, and that given the affiliate relationships among the pipelines providing the transportation for the imported gas, there is reason to suspect that the transportation and sales agreements were not freely negotiated at arms-length.

In opposing Producers' request for a stay, WGML and Minnegasco point out that Producers do not even mention let alone establish that the judicially established standards for stay of an agency action have been met, i.e., (1) that Producers are likely to prevail on appeal; (2) that Producers will suffer irreparable harm if a stay is not granted, and (3) other parties to the proceeding will not suffer substantial harm by issuance of the stay. WGML and Minnegasco state that many of the arguments made by Producers are arguments previously rejected by the ERA and the courts, that Producers have provided no credible evidence of irreparable harm and have cited alleged harm to Northern and its customers as evidence of harm to Producers. On the other hand, WGML and Minnegasco contend that delay in implementation of the import proposal until after judicial review of "any ERA order on rehearing" was completed would be contrary to the best interests of Minnegasco's customers who would benefit from the competitive prices that the import could be expected to promote.

II. Decision

Except for the argument that ERA should compare the merits of transporting the imported gas over existing facilities with Minnegasco's proposed transportation arrangements (Issue No. 11 of Producers' list of alleged errors), all of the issues which Producers identify in their request for rehearing have been raised previously in one form or another in this proceeding, or by Producers, or a member association, Panhandle Producers and Royalty Owners Association, in earlier proceedings.8/ Producers have submitted no new information which would compel the ERA to reconsider the positions it took in Order 191, as well as in prior proceedings. With the exception of certain aspects of these issues, discussed below, we do not intend to revisit Producers' arguments in this Order.

A. Discussion of Issues

1. The ERA Can Rely on the Secretary's Guidelines.

Producers argue that the DOE guidelines are a legal nullity and cannot be relied upon either as a substantive rule or as a statement of policy. They have made the same basic argument in previous ERA proceedings and before the D.C. Circuit Court of Appeals.9/ The argument was rejected in those proceedings and we reject it again here.

The policy guidelines were never intended to be promulgated as a substantive rule by 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 the individual proceeding. The general policy established by the guidelines is made up of certain rebuttable presumptions and the associated burden of proof. Contrary to the Producers' assertion and as the court in Panhandle emphasized,10/ to say the policy guidelines are not binding is not to say they do not or cannot have substantive effect. 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. Producers have had this opportunity during the course of this and other proceedings and they have not rebutted the presumptions nor presented substantial evidence that would provide the Administrator with a basis to find that the requested import authorization was not in the public interest. In contrast, the ERA finds substantial evidence in the record to indicate that Minnegasco's import arrangement is competitive and therefore in the public interest.

As part of their challenge to the ERA's reliance on the policy guidelines, Producers claim the ERA failed to comply with Section 404 of the DOE Act in promulgating the Secretary's policy guidelines. Section 404 provides for mutual consultation between the ERA and the FERC on certain Secretarial matters of intra-agency concern. The specific mechanisms agreed to by the ERA and the FERC to carry out this consultative process in developing the policy guidelines were not intended to be second guessed by private parties. The FERC was an active participant in the development of the guidelines and, since their issuance, has consistently and expressly acknowledged and followed them as promulgated by the Secretary.

Producers' challenge to the validity of the DOE guidelines therefore fails.

2. The Record Shows that The Proposed Import is Needed.

In addition to the arguments previously rejected in Order 191 on the issue of need for the imported gas, Producers attach to their rehearing application a statement by David W. Wilson.11/ Mr. Wilson expresses his opinion that in general additional imports of Canadian gas are not needed in U.S. markets and that the nation's demand can be met with domestic gas supplies. Producers' argument, as supported by Mr. Wilson's opinion, does not address need in terms of the criteria established in the guidelines nor do Producers otherwise rebut the presumption of need based on the ERA's finding

that Minnegasco's proposed import would be competitive in its markets. We note further that DOE projections of national energy supply and demand present a different scenario.12/ Accordingly, we conclude that Producers have provided no new information which would cause the ERA to reconsider the position it took on the issue of need in Order No. 191.

3. Order 191 is not Inconsistent with the Secretary of Energy's Statement on Lack of Open Access Transportation

Producers argue that Order 191 fails to conform to recent findings by the Secretary of Energy regarding the lack of a competitive domestic market. Producers have taken the Secretary's statement out of context. Producers' quote is from the Secretary's report on energy security 13/ which expresses concern that willing buyers and sellers cannot always deal directly with each other because of lack of open access to transportation. We agree that lack of open access transportation is a problem affecting both domestic and imported suppliers. For this reason, the DOE has supported the voluntary open access transportation program established by FERC Order No. 436 (now Order 500).14/ The ERA's action in issuing Order 191 is not inconsistent with the Secretary's statements. The direct purchase authorized by Order 191, like the Order 500 program, moves the market a step closer to being fully competitive.

4. The Pricing Formula is not Anti-Competitive

Producers argue that the pricing formula in the Minnegasco/TransCanada gas purchase contract is anti-competitive and should not have been approved because Minnegasco will be required to pay demand charges to Northern for gas not taken if Minnegasco's contract demand with Northern is not reduced. Producers also contend that the competitiveness of the import should be judged by comparison of the commodity price which Minnegasco must pay to TransCanada with the prices at which domestic producers are willing to sell gas at the wellhead. In addition, Producers contend that FERC Opinion Nos. 256 and 256-A require Northern to reallocate Canadian gas costs to the demand charge, and that under the pricing formula a windfall will accrue to TransCanada since the formula automatically tracks those demand charge increases.

As we indicated in Order 191, Minnegasco is justified in anticipating that its contract demand with Northern will be reduced voluntarily. Northern has not indicated that it will not finalize this arrangement with Minnegasco. If the ERA were to prevent market participants from taking reasonable steps in anticipation of an open market until such time as that market were completely in operation, the result would be to hinder the evolution to a more open market. Further, we disagree with Producers' contention that comparison of

domestic producer wellhead prices with the commodity rate which Minnegasco would pay for the imported gas is a valid indicator of the competitiveness of that commodity rate. Rather, the more meaningful comparison is between the prices which Minnegasco must pay to purchase gas from its only other firm supply source, i.e., Northern. With respect to the effect of FERC Order Nos. 256 and 256-A, the ERA notes that Producers have misinterpreted the effect of the orders. These orders required reallocation of some costs from, not to, the demand charge. Accordingly, Producers have not demonstrated that a windfall will accrue to TransCanada. The ERA therefore sees no reason to reconsider the conclusion reached in Order 191 that the pricing formula is not anti-competitive.

5. Producers' Request for Discovery Was Properly Denied

Producers argue that the ERA improperly denied their requests for discovery as motions pursuant to Section 590.302 of the ERA's administrative procedures on the grounds that their requests were captioned "Request for Discovery" and therefore were not "motions." Producers also argue that since the Public Utilities Commission of the State of Minnesota (MPUC) denied Producers access to proprietary portions of contracts for transportation of the imported gas over the proposed 32-mile intrastate pipeline, the ERA nevertheless should direct discovery of information judged to be entitled to confidential treatment by the MPUC. In addition, Producers contend that the ERA's rules do not make rejection of voluntary requests a prerequisite to a formal request for discovery as Order 191 seems to suggest.

We first note that Producers' requests for discovery were denied primarily for substantive, not procedural reasons, and that such substantive reasons were set forth in Order 191. Second, the ERA's administrative procedures contain no provisions for filing "requests" as opposed to "motions," nor would the ERA exercise its discretion to draw such a distinction in the absence of good cause which clearly has not been shown. Third, Producers request for discovery of "relevant contracts with WGML and the transporters" made prior to issuance of Order 191 gives no hint that Producers were seeking to have the ERA direct discovery of information which the MPUC had withheld from disclosure as proprietary. Had such a request been timely filed, however, it is unlikely that ERA would have granted it, since the ERA concluded in Order 191 that the details of contracts for transportation, even if not proprietary, were not needed to evaluate the pricing formula in the proposed Minnegasco/TransCanada gas purchase contract. Fourth, the ERA's administrative procedures in Section 590.305 clearly contemplate that parties will informally seek discovery of information that they may wish to have before making a formal discovery request. While not a

prerequisite to the granting of a formal discovery request, failure to utilize the informal procedures could indicate an interest more in prolonging the proceeding than in informed analysis. Accordingly, the ERA is not persuaded that it should reconsider its position on Producers' discovery request set forth in Order 191.

6. The ERA Has Complied With the National Environmental Policy Act (NEPA)

The allegation that ERA did not comply with NEPA in issuing the order is without merit. DOE guidelines for NEPA compliance 15/ 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. If it is determined that an EIS is not required, a Finding of No Significant Impact (FONSI) is prepared. In situations where 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. In this case, an EA was prepared by the FERC, and after independently reviewing the analysis contained therein, DOE concluded that the proposed import of natural gas and the related construction and operation of pipeline facilities did not constitute a major Federal action significantly affecting the quality of the human environment.

Contrary to Producers' assertions, DOE was under no obligation to either formally participate in the preparation of the FERC EA, or to prepare a separate EA addressing issues not addressed by FERC, particularly the potential for socio-economic impacts. The "lead agency" concept referenced by Producers only applies after it has been determined that an EIS is required, and that more than one Federal agency is involved (40 CFR 1501.5). DOE was entirely justified in minimizing the expenditure of Federal resources by using, following its independent review, the FERC EA to make this threshold decision. Furthermore, both agencies are held to the same standard in deciding whether their actions result in significant impacts requiring an EIS. FERC had no less of an obligation to examine socio-economic impacts in its EA than would DOE have had in performing a separate analysis. However, an agency is not required to consider socio-economic impacts in a NEPA analysis in the absence of significant effects on the physical environment.16/ This well established principle of case law is reflected in the Council of Environmental Quality's NEPA regulations.17/ Once DOE determined that no significant impacts to the physical environment would occur, no further NEPA analysis was required.

Producers also alleged that DOE failed to follow its own "regulations" in complying with NEPA. Section D of the DOE NEPA guidelines does list the

granting of an import license under Section 3 of the Natural Gas Act which involve new construction as an action which normally requires and EIS. That section also lists the granting of a license not including new construction 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 DOE did not comply with its 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 this licensing action in light of the presumption created by the DOE NEPA guidelines and concluding that the presumption was rebutted because the analysis demonstrated the absence of significant impact on the physical environment. Under these circumstances, a FONSI based on an EA is appropriate.

7. The ERA Does Not Instruct the Applicant As to What Transportation Arrangements Should Be Made for the Imported Gas

Producers raise a new argument that the ERA erred in not evaluating the relative merits of the applicant's proposed transportation arrangements against other available alternatives. We disagree. The ERA's role is to evaluate import proposals as presented by the applicant against the public interest standard set forth in Section 3 of the NGA. The ERA does not intend to tell pipelines nor local distribution companies how to construct their import arrangements or to second guess their business decisions.

8. Producers' Request For A Stay Should Not Be Granted

Producers argue that a stay of Order 191 should be granted pending rehearing and the outcome of any ERA order on rehearing on the grounds that harm for various reasons will accrue to Producers and third party interests. However, Producers provide no credible evidence that such harm will in fact accrue as a result of Order 191. Moreover, the ERA in issuing Order 191 made the determination that Minnegasco's proposed import arrangement was not inconsistent with the public interest. Issuance of the requested stay would delay implementation of a project which would provide Minnegasco and the customers it serves with alternate, competitive supplies. Producers therefore have provided no new information in their rehearing request that would persuade the ERA that implementation of Minnegasco's import arrangement should

not proceed as planned.

B. Conclusion

The ERA has determined that the Producers' application for rehearing presents no information that would merit reconsideration of our findings in Order No. 191. Accordingly, this order denies Producers' request for rehearing and its request for stay of the subject order.

ORDER

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

The application for rehearing and request for stay of DOE/ERA Opinion and Order No. 191 submitted jointly 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, and East Texas Producers & Royalty Owners Association, are hereby denied.

Issued in Washington, D.C., on November 26, 1987.

--Footnotes--

1/ Minnegasco, Inc., 1 ERA Para. 70,721.

2/ 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, and East Texas Producers & Royalty Owners Association.

3/ Northern also opposed the application.

4/ The proposed reduction of Minnegasco's contract volumes with Northern under Order No. 436 is pending before the FERC in Northern Natural Gas Company, et al., FERC Docket No. RP-85-200-000. FERC's Order No. 436

established a voluntary program under which a pipeline agrees to provide non-discriminatory transportation for all prospective customers. 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 Sec. 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.

5/ 49 FR 6684, February 22, 1984.

6/ Energy Security, A Report To The President Of The United States, DOE/S-0057 (March, 1987).

7/ 42 U.S.C. 4321, et seq.

8/ 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 Para. 70,691 (March 24, 1987); 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); Minnegasco, Inc., 1 ERA Para. 70,721 (September 21, 1987); and Texas Eastern Transmission Corporation, 1 ERA Para. 70,733 (October 30, 1987).

9/ See supra note 8.

10/ See supra note 8.

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

12/ 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.

13/ See supra note 6 at pp. 124-125.

14/ See supra note 4.

15/ 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 [Note: The text of this footnote is incomplete.]).

16/ National Association of Government Employees v. Rumsfeld, 418 F. Supp. 1302 (ED Pa. 1976).

17/ 40 CFR Sec. 1508.14.