Cited as "1 ERA Para. 70,740"

Texaco Gas Marketing Inc. (ERA Docket No. 87-22-NG), December 11, 1987.

DOE/ERA Opinion and Order No. 209

Order Granting Blanket Authorization to Import Natural Gas from Canada and Granting Interventions

I. Background

On April 13, 1987, Texaco Gas Marketing Inc. (TGMI) 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 a day and a maximum of 73 Bcf of Canadian natural gas for a two-year period, beginning on the date of first delivery. TGMI intends to import gas from a variety of Canadian suppliers, either for its own account or as an agent for others, for sale to pipelines, electric utilities, distribution companies, and commercial and industrial end-users in the United States. The firm intends to utilize existing pipeline facilities for the transportation of the volumes imported.

TGMI is a corporation organized under the laws of the State of Delaware with its principal place of business in Houston, Texas. It is a wholly-owned subsidiary of Texaco Producing Inc., which is a wholly-owned subsidiary of Texaco Inc.

In support of its authorization request, TGMI asserts that the short-term nature of the requested authority will promote competition in the marketplace. TGMI contends that its proposed import is therefore consistent with the Secretary's import policy guidelines under which the competitiveness of the proposed import is the primary consideration in evaluating the public interest.1/

The applicant proposes to notify the ERA of the date of its first delivery and to file quarterly reports within 30 days following each calendar quarter.

II. Interventions and Comments

The ERA issued a notice of the application on April 24, 1987, with protests, motions to intervene, or comments to be filed by June 8, 1987.2/ Motions to intervene, without comment or request for additional procedures,

were received from Northwest Pipeline Corporation, El Paso Natural Gas Company, Pacific Gas Transmission Company, and Northwest Alaskan Pipeline Company. A joint filing by ten producer associations (Producers) opposed the application.3/ Producers request summary denial of TGMI's application or, in the alternative, a trial-type hearing, or the imposition by ERA of four specified conditions.

TGMI responded to the various allegations and requests contained in the motion filed by Producers, stating that Producers' comments were ambiguous and unclear and should be rejected because they fail to demonstrate that TGMI's import proposal is not inconsistent with the public interest.4/

III. Decision

A. Substantive Issues

The application filed by TGMI has been evaluated to determine if the proposed import arrangement conforms to 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." 5/ The NGA thus establishes a presumption in favor of authorizing an import of natural gas.

The Administrator is guided in making this determination by the DOE's natural gas import policy guidelines.6/ Under these guidelines, the competitiveness of an import in the markets served is the primary consideration for meeting the public interest test. If an arrangement provides for the price or volume flexibility to allow the buyer to respond to changes in the marketplace throughout the contract term, the gas is presumed to be competitive. This marketability in turn gives rise to a presumption of need for the gas in the markets served.

1. Competitiveness of Import Proposed by TGMI

In its application TGMI proposes an arrangement with sufficient flexibility to respond to changing market forces. The import authorization sought by TGMI would provide it with blanket approval, within prescribed limits, to negotiate and transact individual, short-term import arrangements without further regulatory action. The fact that each sale under the requested authorization would be voluntarily negotiated, short-term and market-responsive provides assurance that the transactions would be competitive and would not take place if the gas is not marketable, and hence needed.

In asserting that this import should be denied or conditioned, Producers must persuade the ERA that the arrangement, without the conditions Producers request, would not be competitive in TGMI's gas markets or otherwise would not be in the public interest. Producers do not make this demonstration. To support their request for summary denial of TGMI's application, and as the underlying substantive basis for their alternative requests, Producers argue that TGMI has failed to meet its burden of proof to demonstrate, with probative and reliable evidence, a need for the gas to be imported under the request authorization.7/ Producers claim the application cannot be "saved" by reliance on the guidelines because the guidelines cannot be relied upon either as a substantive rule or as a statement of policy.8/

Producers' arguments, either in identical form or with some variations, have been made in previous ERA proceedings and before the D.C. Circuit Court of Appeals and rejected there.9/ They present no information in this docket to show that this case is different in any significant respect from those cases where these arguments were made and addressed previously.

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 11/ 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 TGMI's import proposal is competitive and therefore in the public interest.

As part of their challenge to the ERA's reliance on the policy guidelines, Producers also claim the ERA failed in some way to comply with Section 404 of the DOE Act in promulgating the Secretary's policy guidelines.

Section 404 provides for mutual consultation between ERA and FERC on certain Secretarial matters of intra-agency concern. The specific mechanisms agreed to by ERA and 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.

2. Request for Conditions

If the ERA does not deny TGMI's application or schedule a trial-type hearing, Producers request imposition of four conditions on a grant of import authority. For the reasons discussed below, we deny this request.

Producers argue, as they have in previous proceedings,12/ that pipelines will not make transportation available to domestic producers in a way that would allow them to compete with Canadian imports. Producers initially requested 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 436.13/ Because Order 436 was vacated and remanded to the FERC, Producers revised its request for a condition to limit TGMI's import markets to only those markets served by pipelines certifying to the ERA that they will transport domestic gas on an open-access basis.14/ In previous proceedings,15/ 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 such a requirement on imported but not domestic supplies, and would therefore lessen competition in the marketplace, and that such a condition is inconsistent with the ERA's commitment to equal treatment and free negotiation embodied in current U.S. gas import policy.

Producers have submitted no new evidence or arguments in support of their revised condition that would compel the ERA to change its position on the open-access issue. Therefore, for the reasons described above, which are discussed in greater detail in the above-cited cases, the ERA is denying Producers' request in this docket that any gas imported under TGMI's proposal be limited to markets served by pipelines that file an affidavit with the ERA certifying that they will transport domestic gas on an open-access basis

without discrimination.

Producers also seek a condition requiring TGMI to obtain from FERC a certificate of public convenience and necessity to make sales for resale in interstate commerce. Producers contend that such a condition would show that the ERA is not attempting to usurp the certificate jurisdiction of the FERC. Since it is clear that gas would not flow in interstate commerce under this import authority without certification as appropriate, there is no need for the condition requested by Producers. Neither the NGA nor ERA regulations limit ERA authority to approve import applications to those where the FERC already has certificated downstream transportation or sales arrangements. Producers' argument that the ERA impose such a certificate condition on the import authorization is not persuasive and the request for the condition is being denied.

Producers ask for a third condition to prohibit application of a two-part rate structure and provide that the import authorization limit the arrangement to a commodity-only border price. In support of this condition, Producers suggest that when two-part rates are applied to imported gas supplies the rates create a competitive disadvantage for domestic producers who are subject to one-part commodity ceiling prices under the Natural Gas Policy Act. The ERA has consistently approved two-part rate structures for import arrangements on the basis that such rate structures are used by domestic pipelines for comparable domestic gas supply arrangements. No two-part rate has been proposed and Producers have presented no information that would indicate two-part rates would be used in this case. However, and more relevant, Producers provide no evidence that even if two-part rates were used, they would discriminate against U.S. producers. Accordingly, the ERA is denying Producers' request for a condition to limit the rate to a commodity-only border price.

Finally, Producers request that the import authorization commence on a date certain. They argue that a two-year term beginning on a date in the indefinite future is tantamount to imposing no term at all on the authorization. Producers argue that, where the ERA grants a two-year term to begin on the date of first delivery of gas, it cannot determine whether such gas is needed in the indefinite future and accordingly should not issue authorizations with an indefinite time duration. Producers characterize those blanket authorizations which have not been "activated" as "time bombs" ready to be triggered at any time, and charges the ERA with "[c]onstructing an inflexible regulatory structure which prevents any change of course in the future regardless of changing circumstances." 16/

Producers' complaint is an inaccurate criticism of an ERA policy that advocates less regulation in an effort to bring greater competition to the international gas market. Blanket authorizations are by their nature flexible and market-responsive vehicles which the ERA believes will accommodate the natural gas industry's needs in these times of change and uncertainty. The marketing flexibility inherent in a grant of blanket authority facilitates and encourages participation in the spot market and enhances competitive pressure to the ultimate benefit of all parties. The flexibility built into the commencement date simply acknowledges that holders of blanket import authority cannot predict spot market opportunities and, in order to participate fully, must have authority in place. The two-year limitation is sufficiently short to ensure that no one is locked into arrangements that cannot respond to changing market conditions, regardless of when the two-year term begins.

Of the approximately 89 orders granted in the past two-and-one half years, about one-third have begun delivery of gas, and thus have started the term of their authorization. However, there are less than 23 months of actual sales experience reported to date. The ERA continues to evaluate quarterly reports by blanket importers as more experience is gained and a meaningful database of the activity is assembled and studied. Producers offer no plausible support for their requested condition and, based upon available data and experience to date, the ERA sees no benefit in changing the terms of authorization. The two-year term limitation and reporting requirements at this time appear adequate to safeguard the public interest. Accordingly, the request for a condition to being this import on a certain date is also being denied.

B. Request For Additional Procedures

Producers request certain additional procedures, including further environmental assessment, an opportunity to conduct discovery and, in the event that the ERA does not reject TGMI's application or denies Producers proposed conditions, "an evidentiary hearing on the record to determine disputed issues of material fact."

1. Request for Trial-Type Hearing

Producers contend they are entitled to a trial-type hearing on the basis of numerous, allegedly disputed issues of fact. These issues include the environmental effects of the proposed arrangement (discussed below in section III.B.3 of this order), security of supply and national security concerns, issues related to the allocation of border facilities, the impact of competition on the domestic gas industry generally, and concerns regarding

whether the gas is needed and whether domestic gas is available at lower prices.

Section 590.313 of the ERA's administrative procedures requires any party filing a motion for a trial-type hearing to demonstrate that there are factual issues 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. Producers, or any party, are not 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 characterized by Producers, their concerns relate to matters which are primarily policy, not factual, in nature, and which are not material to the ERA's public interest assessment under the policy guidelines. Producers' concerns reflect a view of energy policy that departs significantly from DOE's policy to promote competition, including competition from imported gas, for the ultimate benefit of the consuming public and the energy industry.

Producers do not demonstrate that further illumination of the issues or development of the facts would be aided materially by a trial-type hearing or that such a hearing is necessary to assure the adequacy of the record or the fairness of this proceeding. All parties, including Producers, have had sufficient opportunities to comment on the proposed arrangement and the parties' positions on the issues, and any facts presented and necessary to support those positions are adequately represented in the record and provide the ERA with a sufficient basis on which to make a decision. Accordingly, the ERA has determined it would not be in the public interest to hold additional procedures and Producers' request for a trial-type hearing is therefore being denied.

2. Request for Discovery

Producers also request an opportunity to conduct discovery of information allegedly needed to: (1) determine the identity of the parties to this proposal; (2) determine the competitive effects of the proposed authorization on domestic producers; and (3) "develop data to test the reasonableness of Unocal's [sic] claim that these gas supplies are needed and cannot be supplied more economically from domestic sources." 17/

Producers request discovery of information that is not relevant to a public interest determination under the policy guidelines and the precedent for these kinds of short-term, market-responsive arrangements. The first

category identifies information that, excepting the applicant's identity, is not yet known, an observation that is true with respect to blanket import proposals generally. The second and third categories similarly request information that reflects Producers' differing policy perspective rather than undisclosed and relevant facts. The public interest inquiry into the competitiveness of an import proposal does not focus on the competitive effect of an arrangement on domestic producers, or for that matter on any competitor, nor on whether in a particular instance the gas can be supplied more economically by domestic or other suppliers. The inquiry focuses instead on whether a freely negotiated arrangement, as proposed and taken as a whole, provides an importer the flexibility to respond to market changes and thereby enhances competitive pressure on market participants. Need is presumed if an import arrangement is found to be competitive.

The information necessary to determine whether TGMI's import proposal is not inconsistent with the public interest is in the record. Accordingly, because Producers have made no showing that there is information in the possession of the parties and relevant to the decision in this proceeding that granting this request would disclose, their request for discovery is being denied.

3. Environmental Determination

Producers claim an evidentiary hearing is necessary to evaluate possible environmental effects of the proposed import and they charge that the ERA must assess its action here under the National Environmental Policy Act (NEPA). Producers argue that the DOE's environmental regulations, 10 CFR Part 1201, characterize this application as one that "normally requires an environmental assessment" because, although it does not entail the construction of new facilities, it is beyond the scope of a categorical exclusion. The ERA has considered this argument previously18/ and concluded, in the context of factual circumstances not materially distinguishable from the facts in this proceeding, that the argument is without merit. DOE guidelines for NEPA compliance19/ provide for three possible levels of analysis, depending on the potential for environmental impact. In cases where there is clearly a potential for significant impact, an environmental impact statement (EIS) is prepared. In uncertain cases, an environmental assessment (EA) is prepared to determine if an EIS is needed. In situations when clearly no significant impacts will occur which could necessitate the preparation of an EIS, a memorandum to the file is prepared to document this fact. A memorandum of this type was prepared in this instance. The analysis contained therein supports the conclusion that, because existing pipeline facilities will be used, clearly there should be no significant impact to the physical environment.

Indeed, the intervenors have alleged only that the ERA should analyze a potential for significant socio-economic impacts. However, it is well established by both case law and by regulation that socio-economic impacts, alone, do not establish a basis for requiring an EIS.20/ Therefore, a memorandum to the file is the appropriate level of NEPA compliance when no other concerns involving the physical environment are at issue.

C. Conclusion

The TGMI 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 TGMI's application, provides assurance that the transactions will be competitive. Under the proposed import, TGMI's 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. The only opposition here has come from associations representing domestic producers and some service companies that are in competition with importers and potential importers such as TGMI.

Although TGMI has applied for authorization to import 100 MMcf of natural gas per day over a two-year period, the ERA, primarily in order to allow TGMI maximum competitive flexibility, will treat the request as an application to import up to 73 Bcf over a two-year period and will not impose a daily limitation.

After taking into consideration all the information in the record of this proceeding, I find that granting TGMI blanket authority to import up to a maximum of 73 Bcf over a two-year term is not inconsistent with the public interest.

ORDER

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

A. Texaco Gas Marketing Inc. (TGMI) is authorized to import up to a maximum of 73 Bcf over a two-year period, beginning on the date of first delivery.

B. TGMI shall notify the Economic Regulatory Administration (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, TGMI 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 reports shall also provide the details of each transaction, including the names of the seller(s) and purchaser(s), including those other than TGMI, estimated or actual duration of the agreement(s), transporter(s), points of entry, markets served and, if applicable, the per unit (MMBtu) demand/commodity charge breakdown of the 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 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 & 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 for dismissal of TGMI's application, a trial-type hearing, an additional discovery opportunity, and imposition of each of the four requested conditions are denied.

Issued in Washington, D.C., December 11, 1987.

--Footnotes--

1/ 49 FR 6684, February 22, 1984.

2/ 52 FR 17329, May 7, 1987.

3/ 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 & 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.

4/ Response of Texaco Gas Marketing Inc. To Petition To Intervene And Supplemental Comments of Various Producers Associations, (July 9, 1987).

5/ 15 U.S.C. Sec. 717b.

6/ See Supra note 1.

7/ Comments And Petition For Leave To Intervene Of Producer Associations (July 8, 1987), at 4.

8/ Id., at 9.

9/ Panhandle Producers and Royalty Owners Association v. Economic Regulatory Administration (Panhandle), 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); and Minnegasco, Inc., 1 ERA Para. 70,721 (September 21, 1987).

10/ Id.

11/ Id.

12/ 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); and Bonus Energy, Inc., 1 ERA Para. 70,691 (March 24, 1987).

13/ FERC's Order No. 436 established a voluntary program under which a pipeline agrees to provide non-discriminatory transportation for all 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 Para. 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.

14/ Supplement To Comments Of Producers Associations (June 24, 1987).

15/ See supra note 12.

16/ See supra note 7, at 6, 7.

17/ See supra note 7, at 11.

18/ See Tennessee Gas Pipeline Company, Western Gas Marketing U.S.A., Ltd., and Enron Gas Marketing, Inc., 1 ERA Para. 70,684 (January 5, 1987); and Bonus Energy, Inc., 1 ERA Para. 70,702 (May 26, 1987).

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

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