Cited as "1 ERA Para. 70,133"

Pan National Gas Sales, Inc. (ERA Docket No. 87-34-LNG), December 23, 1988.

DOE/ERA Opinion and Order No. 289

Order Granting Authorization to Import Liquefied Natural Gas from Algeria and Imposing Conditions

I. Background

On June 30, 1987, Pan National Gas Sales, Inc. (Pan National), 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 a 20-year authorization to import up to 3,300 million MMBtu's or approximately 3.3 Tcf, of Algerian liquefied natural gas (LNG) from Sonatrading Amsterdam B.V. (Sonatrading), a Netherlands company that is wholly owned by Sonatrach, the state oil and gas company of Algeria.

Pan National, a Delaware corporation with its principal office in Houston, Texas, is a wholly owned subsidiary of Panhandle Eastern Corporation (PEC). PEC, a holding company, also has other affiliates or subsidiaries, including the Trunkline LNG Company (TLC) and Pan Transportation Inc. (Pan Transport). The volumes of LNG proposed to be imported would be purchased pursuant to a purchase agreement dated April 26, 1987, transported to the U.S. in existing LNG tankers to be supplied by Sonatrach and Pan Transport, received and regasified by TLC at its Lake Charles, Louisiana, terminal, and resold under spot, intermediate, or longer-term arrangements, depending on current market conditions.

Pan National would market the LNG to individual customers and negotiate with each contract terms responsive to current market conditions. Under this arrangement Sonatrading would receive 63.24 percent of the sales price, F.O.B. Algeria. The basic provisions of each prospective sales agreement would be subject to confirmation by Sonatrading prior to execution. Pan National would not be subject to any minimum purchase requirement and would only have to take those quantities of LNG that have been specifically contracted for by its customers. Separate contracts for transportation and terminal services between Sonatrach and TLC (now assigned to Pan National) and Pan National and Pan Transport would only obligate Pan National to pay the actual incremental costs involved in obtaining those services and would contain no take-or-pay commitments.

In addition, the application stated that if LNG purchases are resumed under the September 17, 1975, LNG purchase contract between TLC and Sonatrach (1975 purchase agreement), obligations under the proposed import arrangement would be limited to the existing sales arrangements previously agreed to by all parties prior to resumption. The 1975 purchase agreement was the basis for a 20-year, 3.4 Tcf LNG import authorization granted by the Federal Power Commission (FPC) in Opinion Nos. 796 and 796-A.1/

II. Procedural History

The ERA issued a notice of the application on August 19, 1987, inviting protests, motions to intervene, notices of intervention, and comments to be filed by September 25, 1987.2/ Motions to intervene, or notices of intervention, without comments or requests for additional procedures were filed by Tennessee Gas Pipeline Company, Southern Energy Company, Indiana Gas Company, Michigan Consolidated Gas Company, Williams Gas Marketing Company, Maxus Exploration Company and Diamond Shamrock Offshore Partners Limited Partnership (in a joint motion), El Paso Natural Gas Company, Consumers Power Company, Cabot Energy Supply Corporation, Distrigas Corporation and Distrigas of Massachusetts Corporation (in a joint motion), ANR Pipeline Company, the Association of Businesses Advocating Tariff Equity, Columbia Gas Transmission Corporation, the State of Louisiana, Northern Indiana Public Service Company, Statoil North America, Inc., and the Texas Independent Producers and Royalty Owners Association.

The Union Pacific Resources Company (UPRC) filed a motion to intervene in protest. UPRC contended that: (1) no specific pricing data is provided in the application and therefore the competitiveness of the arrangement cannot be determined, (2) Pan National has offered no proof that a need for the natural gas exists in the U.S. market, (3) the gas will displace sales by domestic producers, and (4) increasing reliance on imported energy supplies is detrimental to U.S. security interests.

General Services Customers Group (GSC), an ad hoc group of 11 natural gas distribution companies located in the Midwest,3/ filed a motion to intervene and requested that any new authorization be conditioned on the revocation of TLC's current authorization, issued by the FPC in Opinion Nos. 796 and 796-A,4/ pursuant to the 1975 purchase agreement. GSC maintained that the requested authorization is intended to supersede the current one and, therefore, the current authorization should be revoked.

The United States Department of Justice (DOJ) filed a motion to intervene in opposition to the application and requested additional

procedures. DOJ's basic contention was that granting the requested authorization would not be consistent with the public interest because of the past performance of PEC and its affiliates under the 1975 import arrangement with Sonatrach. Specifically, DOJ contended that PEC has jeopardized the security of bonds which were granted by the United States Maritime Administration (USMA) and issued in order to finance the construction of two LNG tankers to be owned and operated by Lachmar, now a wholly owned subsidiary of PEC, and which were to be used to transport a portion of the LNG taken pursuant to the 1975 purchase agreement. DOJ stated that granting the requested authorization would subject the United States to financial risk and condone TLC's repudiation of contractual obligations with the United States.

Pan National, in a response to DOJ's filing, requested that the ERA deny DOJ's motion to intervene because DOJ's alleged interests pertain to collateral matters that are not within the "zone of interests" that are part of this proceeding.

On February 11, 1988, the ERA issued a procedural order providing an opportunity for additional comments by the parties, denied Pan National's request that DOJ's motion to intervene be denied, and granted intervention to all movants.5/ DOJ was the only party to file a response to the procedural order. Pan National filed an answer to DOJ's response.

III. Comments Received

A. DOJ Filings

As stated above, DOJ contends that PEC and its affiliates' past conduct has jeopardized the security of bonds which were guaranteed by the USMA, and that as a result of that conduct PEC and/or its subsidiaries have materially and significantly damaged the USMA's interests. On April 10, 1987, the United States, on behalf of the USMA, sued PEC, various PEC affiliates, and others in the United States District Court for the District of Delaware based on the alleged wrongs committed by PEC and its subsidiaries. On August 15, 1988, the United States District Court for the District of Delaware issued a Memorandum Opinion and Order in Civil Action No. 87-190-JLL granting plaintiff United States partial summary judgment, and, in effect, disposing in the Government's favor the issues DOJ raises collaterally in this proceeding.

Based on the past conduct of PEC and/or its affiliates, DOJ in its intervention argued that Pan National's application should be denied, or, in the alternative, requested that any authorization issued by the ERA be conditioned upon PEC and its subsidiaries providing the USMA with adequate

security to ensure that Lachmar's obligations pursuant to the USMA guaranteed bonds will be met. DOJ further requested that, if the facts currently before the Delaware District Court are disputed by PEC, the ERA stay the application pending resolution of those factual issues in the Delaware proceeding.

DOJ claimed that the actions of PEC and its subsidiaries, in putting the USMA at risk, have been contrary to the public interest, in that the public interest requires no less than the full honoring of contractual commitments.

DOJ argued further that if PEC is allowed to avoid the financial obligations its affiliates owe to the USMA, it will derive a substantial economic benefit from that avoidance and, therefore, gain an unfair competitive advantage over other energy suppliers.

DOJ next argued that TLC's original authorization was consistent with the public interest in that it helped maintain a secure and reliable U.S. Merchant Marine; however, the import arrangement underlying the requested authorization does not specify the use of the Lachmar vessels, and, therefore, does not facilitate the public interest in a secure U.S. Merchant Marine.

DOJ further contended that if the Government is successful in its suit against PEC in the Delaware District Court that the underlying purchase agreement in this application could be terminated; therefore, that underlying purchase agreement does not represent a secure basis for importing LNG.

In the alternative to denying Pan National's application, DOJ requested that the ERA condition any authorization upon a requirement that PEC or its affiliates provide an adequate and unconditional guarantee of payment by Lachmar of its debt obligations under the USMA guaranteed bonds.

Finally, DOJ argued that, to the extent that any of the facts regarding the history of the PEC/USMA dispute are in question, those factual issues should be decided by the Delaware District Court, and that the ERA should stay its consideration of the Pan National application pending the resolution of those factual issues by that court.

In its reply to the July 11, 1988, procedural order, DOJ essentially reiterated the arguments made in its original intervention and repeated a request for an oral presentation pursuant to DOE regulations.6/ DOJ stated that there are substantial legal and policy questions that should be addressed in an oral presentation, including: (1) whether the application is consistent with the public interest, (2) the extent to which factors unrelated to competitive considerations should be taken into account by the ERA, (3)

whether PEC's actions have given it an unfair competitive advantage, (4) whether the contemplated import arrangement presents a secure source of supply, (5) whether the ERA should condition its approval on the granting of security to the USMA for the Lachmar bonds it has guaranteed, and (6) whether the proceedings should be stayed pending resolution of issues before the United States District Court for the District of Delaware.

B. Pan National's Response to DOJ's Comments

On October 7, 1987, Pan National filed an answer to DOJ's motion to intervene, opposing that motion because: (1) it sought to raise issues outside the scope of the proceeding, (2) DOJ improperly sought to use the filing of its motion as economic coercion with respect to the civil action brought by DOJ that is currently pending in the Delaware District Court, and (3) DOJ is not entitled to be heard on the matters it sought to put in issue because it deliberately chose to remove itself from the settlement process which led to the dispute in the Delaware District Court.

Pan National stated further that every factual allegation or legal issue set forth in DOJ's motion is presented in the existing Delaware court action, and, therefore, any relief that DOJ is entitled to should be obtained from the Delaware District Court and not litigated before the ERA. Pan National claimed that the motion is simply an effort to subject the PEC companies to economic coercion in the Delaware action by having the ERA deny Pan National's authorization request or stay its consideration.

Pan National filed reply comments on the response of DOJ to the July 11, 1988, procedural order in which it basically reiterated the arguments made in its original reply.

C. Other Protests and Requests for Conditions

UPRC in its motion to intervene in protest to Pan National's application contended that the application should be denied because it is deficient. UPRC questioned the import arrangement inasmuch as there was no specific hard pricing data on which to make a determination of competitiveness. Further, UPRC disputed the need for the LNG, stating that current domestic natural gas market statistics do not justify a finding of need for additional gas supplies, and, also, expressed concerns that the LNG would displace domestic gas supplies and exacerbate PEPL's take-or-pay problems. Finally, UPRC stated that the requested authorization could lead to long-term harm to domestic natural gas producers and, therefore, be harmful to the United States' national security interests.

GSC did not protest or seek a denial of Pan National's application, but did request the ERA to condition Pan National's authorization by terminating the prior import authorization issued to TLC pursuant to the 1975 purchase agreement. GSC argued that no importation has occurred under that authorization since December 1983, and that the current application, and its underlying purchase agreement, are intended as a replacement for the 1975 arrangement.

Neither UPRC or GSC filed responses to the July 11, 1988, procedural order, nor did Pan National make any reply filings regarding their interventions.

IV. Decision

The application filed by Pan National has been evaluated to determine if the proposed import arrangement meets the public interest requirements of Section 3 of the NGA. Under Section 3, an import must be authorized unless there is a finding that it "will not be consistent with the public interest." 7/ In making this decision the Administrator is guided by the DOE's natural gas import policy guidelines.8/ Under the guidelines, the competitiveness of an import in the markets served is the primary consideration involved in the public interest test; however, under a long-term import proposal, need for the LNG and security of the supply are also considerations.

For the reasons set forth below, I find that it has not been shown that Pan National's proposed arrangement for importing LNG, as requested in its application in this docket, will be inconsistent with the public interest.

A. Issues Raised by DOJ

All of DOJ's arguments concerning why Pan National's authorization request should be denied, stayed, or conditioned are based on issues arising from the dispute with PEC and its affiliates concerning USMA's guarantee of bonds issued in order to finance the construction of two LNG tankers which were to be used to transport a portion of the LNG taken pursuant to the 1975 purchase agreement. As noted above in Section III A of this opinion, these arguments have been heard by the United States District Court for the District of Delaware, which has decided in the Government's favor.

DOJ is essentially asking the ERA to make findings on the merits of the contractual dispute with PEC, arising from the prior 1975 purchase agreement, which is being litigated in the Federal courts. We do not believe it is appropriate to relitigate those issues in this administrative proceeding,

where the resolution of those issues is neither directly relevant to the ERA's decision nor necessary to fulfill our "public interest" responsibilities. Those contractual issues are properly before the Federal courts. Because we appreciate DOJ's concerns, we wish to emphasize that this order is not intended to indicate any position on DOJ's arguments or interfere with DOJ's right to pursue its position and full legal remedies before the Federal courts, including, if necessary, on appeal. Also, any authority granted to Pan National by this order would be subject to any court ordered judgment and to any conditions imposed by the courts which might affect this current import arrangement. Therefore, the ERA will not address those issues or contentions raised by DOJ which are not directly related to the proposed arrangement.

DOJ does raise one contention which touches peripherally on the competitiveness of the application before the ERA: that PEC has gained a financial benefit from the USMA which would give it an unfair competitive advantage over other energy suppliers. This assertion is speculative and DOJ offers no facts to support it. It is significant that no energy supplier in competition with PEC made any similar claims.

Also, DOJ requested an opportunity for an oral presentation. The list of issues that DOJ wishes to comment on in an oral presentation are essentially the same ones which it has raised in written filings. Because the ERA has found that those issues are for the Federal courts to decide, and do not have a bearing on the competitiveness of this arrangement, an oral presentation will not materially aid the ERA in making its determination on this application. Therefore, DOJ's request is denied.

B. Other Issues

UPRC asserts that the ERA cannot make a finding on the competitiveness of the proposed import arrangement because Pan National has not submitted any data on the pricing of any specific import transaction. However, under Section 3 of the NGA the burden of proof rests with the party asserting that the proposed import arrangement is not consistent with the public interest. UPRC has offered no evidence to meet this burden, or to refute Pan National's claim that the arrangement, even without advance knowledge of the precise terms of each sale, will be competitive, inasmuch as each sale would be freely negotiated and would take place only if the gas was marketable, competitively-priced and needed.

UPRC also questions the need for the imports and the security of the import supply. The policy guidelines recognize that the need for an import is a function of competitiveness. Under the proposed import arrangements, Pan

National's customers will purchase LNG only to the extent that it is competitively priced, and the ERA can fairly presume that no one will purchase LNG that is not needed.

Further, security of supply is not a major issue in this case. Pan National stated in its application that the total contract volume of LNG represents less than 3 percent of Sonatrach's proven gas reserves and the annual contract volume equals only 15 percent of Sonatrach's existing liquefaction capacity. No party questioned Pan National's statement, and there is no basis for concluding that Sonatrach would be unable to supply reliably any volumes of LNG that are contracted for, or that the imports of LNG would lead to undue dependence on unreliable sources of supply.

UPRC's final contention, that approval of Pan National's application and the subsequent importation of Algerian LNG would result in displacement of domestic natural gas production and sales, and exacerbate the take-or-pay problems of PEC, is speculative. Although given a full opportunity to do so, UPRC has not provided any support for its contention. Moreover, the LNG will not be replacing PEC system supply, and will only be imported if a customer has already contracted to purchase it. Domestic producers are, of course, free to compete for this business.

GSC's motion that any approval of Pan National's requested authorization be conditioned on the termination of the authorization currently held by TLC is predicated on the idea that the current application is intended as a replacement for TLC's authorization. According to the applicant, however, the LNG purchase agreement that is the basis for the current application specifically contemplates the continued existence of TLC's authorization and has a provision which provides for termination of the new purchase agreement in the event that performance under the suspended 1975 purchase agreement resumes. GSC has provided no reason why we should not accept the applicant's characterization. Moreover, it is noted that the ERA, in DOE/ERA Opinion and Order No. 50A,9/ required TLC to give the Administrator 90-days notice prior to any resumption of LNG imports pursuant to its current authorization. That requirement remains in effect and nothing in this proceeding shall be construed as constituting the 90-day notice required by Order 50A. Therefore, GSC's request that the ERA exercise its discretion and terminate TLC's authorization is denied.

C. Conditions on the Long-term Authorization Request and the Proposed Reporting Requirements

Pan National's application seeks a 20-year authorization to import LNG

to sell to individual customers under contracts that will be freely negotiated in response to market conditions. No party has objected to the 20-year term proposed by Pan National.

The ERA has routinely granted authorizations to import natural gas and LNG for sale under to-be-negotiated terms that will reflect market conditions.10/ Because such sales will occur only if the gas is marketable, competitively-priced and needed, import arrangements that facilitate such transactions are presumptively in the public interest. However, to ensure that so-called "blanket import authorizations" are sufficiently flexible to respond to changes in market conditions, such authorizations have been limited to two-year periods.

Under its arrangement with Sonatrading, Pan National would not be subject to any minimum purchase requirement. Because Pan National would only have to take those quantities of LNG that have been specifically contracted for by its customers, the Pan National/Sonatrading arrangement would have much the same flexibility as a "blanket" import authorization. In order to ensure that this flexibility is not compromised by the long-term nature of the Pan National/Sonatrading arrangement, the ERA is imposing the following condition on Pan National's authorization: for any LNG imported pursuant to the authorization granted in this order which involves an offer and acceptance for the sales and purchase of LNG (as defined in Article II of the April 26, 1987, LNG Purchase Agreement between Sonatrading and TLC) which is over two years in length, Pan National or some other designated applicant shall file with the ERA, within 90 days of the offer and acceptance, a separate application for import authority for those imports. The application should include the offer and acceptance and any underlying purchase contracts. The ERA will then process such applications in accordance with its normal procedures. No LNG shall be imported longer than two years after the first delivery pursuant to such offer and acceptance unless it has been separately authorized by the ERA.

This condition will permit Pan National to develop and initiate various import sales arrangements while at the same time allowing the ERA to meet its Section 3 responsibilities. Also, this condition will prevent Pan National from gaining an unfair competitive advantage over importers who have two-year blanket authorizations, while, at the same time allowing Pan National to implement its long-term import arrangement.

The ERA notes that Pan National proposes to report the first delivery of LNG pursuant to this authorization within 15 days of such delivery and to file quarterly reports 45 days after the end of each calendar quarter. The ERA will impose its standard reporting requirements of two weeks and 30 days

respectively.

D. Conclusion

After taking into consideration all of the information in the record of this proceeding, I do not find that granting Pan National authorization to import up to 3.3 Tcf of Algerian LNG for a period of up to 20 years, subject to conditions, for marketing at competitive prices under short-term, interruptible, and spot market arrangements would be inconsistent with the public interest.11/

ORDER

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

A. Pan National Gas Sales Inc. (Pan National) is authorized to import up to 3.3 Tcf of Algerian liquefied natural gas (LNG) over a period of up to 20 years, beginning on the date of first delivery, pursuant to its application filed in this docket, and in accordance with the terms of the April 26, 1987, LNG Purchase Agreement between Sonatrading Amsterdam B.V. (Sonatrading) and Trunkline LNG Company (TLC) (LNG Purchase Agreement) as represented by the applicant and described in this Opinion and Order.

B. This LNG is to be imported at the Lake Charles, Louisiana, LNG regasification terminal of TLC.

C. Pan National shall notify the Economic Regulatory Administration (ERA) in writing of the date of the first delivery of LNG authorized in Ordering Paragraph A above within two weeks after such delivery.

D. With respect to the LNG imports authorized by this Order, Pan National shall file with the ERA, within 30 days following each calendar quarter, quarterly reports indicating whether purchases of imported LNG have been made, and if so, giving, by month, the total volumes of the imports in Mcf and the average selling price per MMBtu to Pan National's customers and Sonatrading's portion of that price. The reports shall also provide details of each transaction, including the names and geographic location of ultimate purchasers of the LNG, the estimated or actual duration of each sales agreement, the transporters and the LNG tankers used, the 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, ship-or-pay, or make-up provisions.

E. For any LNG imported pursuant to Ordering Paragraph A above which is imported pursuant to an offer and acceptance, as defined in Article III of the LNG Purchase Agreement, with a term in excess of two years, Pan National or a designated importer shall file with the ERA a separate application for import authorization for that LNG within 90 days of the date of the offer and acceptance. No LNG shall be imported after two years from the first delivery pursuant to such offer and acceptance unless it has been separately authorized by the ERA.

F. The requests by the United States of America for denial of Pan National's authorization request, a stay of the proceedings in this docket, the imposition of a condition on the authorization, and an oral presentation are denied. The request of Union Pacific Resources Company for denial of Pan National's authorization request is denied. The request of the General Service Customer Group for the imposition of a condition on the authorization is denied.

Issued in Washington, D.C., on December 23, 1988.

--Footnotes--

1/ 58 FPC 726 (1977) and 58 FPC 2935 (1977). On October 28, 1982, the ERA, in response to numerous complaints that the LNG imported pursuant to the Sonatrach/TLC arrangement was no longer needed, the price was no longer reasonable, and the supply was not reliable, initiated a proceeding to investigate these allegations. Prior to a final decision by the ERA, TLC announced that it was suspending LNG imports from Sonatrach. As a result of TLC's decision to suspend LNG imports, the ERA issued DOE/ERA Opinion and Order No. 50A. Trunkline LNG Company, 1 ERA Para. 70,119 (March 7, 1984), dismissing without prejudice the various filings and, in effect, suspending the proceedings pending the outcome of further negotiations between TLC and Sonatrach. Order No. 50A did not preclude TLC from resuming LNG imports under its existing authorization but did condition that authorization by requiring TLC to give the Administrator 90-days advance notice prior to resumption in order to provide interested persons the opportunity to raise relevant issues.

2/ 52 FR 32163, August 26, 1987.

3/ The General Service Customers Group consists of: Associated Natural Gas Company, Battle Creek Gas Company, Central Illinois Light Company, Central Illinois Public Service Company, Citizens Gas Fuel Company, Illinois Power Company, Michigan Gas Utilities Company, Ohio Gas Company, Richmond Gas Corporation, Southeastern Michigan Gas Company, and Union Electric Company.

4/ See supra note 1.

5/ Unpublished.

6/ 10 CFR Sec. 590.312.

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

8/ 49 FR 6684, February 22, 1984.

9/ Trunkline LNG Company, 1 ERA Para. 70,119 (March 7, 1984).

10/ See Panhandle Producers and Royalty Owners Association v. ERA (Panhandle I), 822 F.2d 1105 (D.C. Cir., June 30, 1987), and Panhandle Producers and Royalty Association v. ERA (Panhandle II), 847 F.2d 1168 (5th Cir., June 28, 1988).

11/ The DOE has determined that granting this application is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321, et seq.) and therefore an environmental impact statement or environmental assessment is not required. The ERA has filed a Memorandum to this effect for the record in this docket.