Cited as "1 ERA Para. 70,756"

Texaco Gas Marketing, Inc. (ERA Docket No. 87-22-NG), February 10, 1988.

DOE/ERA Opinion and Order No. 209-A

Order Denying Rehearing and Stay of Order

I. Background

On December 11, 1987, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 209 (Order 209),1/ in ERA Docket No. 87-22-NG, granting Texaco Gas Marketing, Inc. (TGMI), blanket authority to import up to 73 Bcf of Canadian natural gas over a two-year term for itself or on behalf of others beginning on the date of first delivery. Order 209 authorizes TGMI to import Canadian natural gas over the term without daily volume limitations.

A joint motion to intervene by ten producer associations (Producers) 2/ opposed the application, requested summary denial of the application, or alternatively, requested that the ERA either hold a trial-type hearing or impose conditions on the authorization that would (1) require any gas imported under the authorization to be transported through pipelines providing open access transportation under the Federal Energy Regulatory Commission's (FERC) Order No. 436 (now Order No. 500) program,3/ (2) eliminate TGMI's two-part rate, (3) require issuance of a certificate authorization by the FERC to make sales for resale in interstate commerce, and (4) set a date certain to begin the two-year term. Producers also requested the ERA to authorize the conduct of discovery, alleging that additional information was needed regarding: (1) the identity of the parties to TGMI's import proposal; (2) the competitive effects of the proposed import on domestic producers; and (3) data as to the reasonableness of TGMI's claim that the imported gas is needed and cannot be supplied more economically from domestic sources.

Order 209 denied Producers' requests for summary denial of the application, a trial-type hearing, imposition of conditions on the authorization, and discovery, and approved TGMI's request for a blanket authorization to import up to 73 Bcf over a two-year term.

Producers filed an application for rehearing of Order 209 on January 11, 1988. The application also seeks a stay of the order pending judicial review.

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

erred in: (1) relying on the DOE natural gas policy guidelines4/ 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;5/ (5) failing to consider the anti-competitive effects of the order without adequate conditions to protect against long-term harm to domestic supplies; (6) failing to follow its own regulations regarding the information that must be disclosed to permit adequate public discussion of the applicant's proposal; (7) failing to conduct the trial-type hearing requested by Producers; (8) failing to permit discovery of facts central to the ERA determinations; (9) failing to consider the cumulative effects of this and the other blanket import authorizations already granted by the ERA; and (10) failing to conduct an environmental assessment, or to otherwise meet the requirements of the National Environmental Policy Act of 1969 (NEPA).6/

II. Decision

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.7/ Producers have submitted no new information which would compel the ERA to reconsider the positions it took in Order 209, 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 contend 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 this same basic argument in previous ERA proceedings, and before the D.C. Circuit Court of Appeals,8/ and earlier in this proceeding. They present no new information which would cause the ERA to reconsider its rejection of this argument in issuing Order 209 or to distinguish it in any significant respect from previous cases in which this argument was rejected.

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 exercising his discretion in making a Section 3 "public interest" determination. The ERA can rely on the

policy guidelines, including the presumptions set forth therein, 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 9/ 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 is not in the public interest.

As part of their challenge to the ERA's reliance on the policy guidelines, Producers claim that the ERA failed to comply with Section 404 of the Department of Energy Organization Act (DOE Act) 10/ in promulgating the Secretary's guidelines. Specifically, Producers allege that the FERC never formally voted to accept or deny referral of the guidelines to the FERC for consultation and have filed affidavits from J. David Hughes and Kenneth F. Plumb 11/ attesting to the lack of a formal Commission vote. Section 404 provides for mutual consultation between the ERA and the FERC on certain Secretarial actions of inter-agency concern. The specific mechanism agreed to by the ERA and the FERC to carry out this consultation process were never intended to be second guessed by private parties. Further, as we stated in Order 209, the FERC was an active participant in developing the guidelines and has expressly acknowledged and followed them since their issuance.

2. The Burden Of Proof Analysis Is Consistent With Statute And Policy

Producers offer no new argument or information in support of their related contention that the policy guidelines wrongly reallocate the burden of proof from the proponents to the opponents of an import arrangement. Their argument ignores the Section 3 statutory presumption favoring import authorization and relies on former import policy that has been superseded by the current guidelines and therefore is no longer a valid precedent and binding on the ERA. In making its determination in Order 209, the ERA considered and weighed all the information provided by the parties to the proceeding, considered precedent, and acted in accordance with statute and policy.

3. The Record Shows That The Proposed Import Is Needed

In addition to the arguments previously rejected in Order 209 on the issue of need for the imported gas, Producers refer to a statement by David W. Wilson 12/ attached to their intervention and protest to "rebut any possible presumption that the subject gas is needed." The thrust of Mr. Wilson's statement is that imported gas cannot be presumed to be needed based on its

competitiveness because, although some domestic producers have lower priced natural gas than Canadian gas, they cannot compete with importers in some markets because of the lack of open access transportation or because the rate structures of transporting pipelines do not provide a level playing field for gas competition.

The public interest inquiry into the competitiveness of an import, and resulting presumption of need if an import is found to be competitive, focuses on whether the negotiated arrangement, taken as a whole, provides the importer with the ability to compete in the marketplace, and with the flexibility to respond to market changes and thereby enhance competitive pressure on market participants. It does not focus on the competitive effect of an arrangement upon domestic producers, nor on whether the gas can be supplied more economically by domestic or other suppliers in a particular instance. In this case, as noted in Order 209, the ERA determined, based on the record, that TGMI's import arrangement is competitive and therefore in the public interest. Producers have provided no new information that would convince the ERA to reconsider its finding in Order 209 that the imported gas is competitive and is needed within the meaning of Section 3 of the NGA and DOE policy.

4. Order 209 Is Not Inconsistent With The Secretary Of Energy's Statement On Lack Of Open Access Transportation

Producers argue that Order 209 fails to conform to recent findings by the Secretary of Energy regarding the lack of a competitive domestic market and allege that the lack of competitiveness is aggravated by preferential treatment for available pipeline transportation arising from affiliated relationships with Canadian suppliers. 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 inhibits competition, but it is a problem similarly affecting domestic and Canadian suppliers. For this reason, the DOE has supported the voluntary open access transportation program established by FERC Order No. 436 (now Order No. 500),14/ and has proposed legislation authorizing the FERC to mandate transportation. Order 209 is not inconsistent with the Secretary's statement.

Further, the Energy Security report specifically addresses the role imported gas plays in enhancing our energy security by stating:

> Imports from reliable sources can provide a stable and secure addition to domestic resources. Although imports make up only about 5

percent of U.S. consumption, they have contributed to a decline in the average prices U.S. consumers pay for natural gas. Eliminating the remaining barriers to trade will ensure that the lowest cost supplies of natural gas are brought to consumers.15/

With respect to Producers' contention that affiliated relationships with Canadian suppliers unfairly restrict the availability of open access pipeline transportation, the ERA notes that affiliate relationships also exist between domestic suppliers and transporters. Moreover, this problem, if it exists, is subject to an ongoing FERC proceeding in which discrimination charges involving affiliated relationships are being examined.16/

5. Conditioning Of Order 209 Is Not Needed

In their request for rehearing, the Producers request, in the alternative, that the same four conditions be attached to Order 209 that they requested initially and that the ERA denied in this docket and in other previous cases. Producers have failed to convince the ERA that it should reconsider its decision to deny these conditions.

The condition requiring that the gas imported under Order 209 be transported only by open access transporters was denied as being discriminatory toward imported gas and inconsistent with the ERA's commitment to free trade and buyer-seller negotiation embodied in current U.S. gas import policy. The Producers' repeated assertion that this blanket import, together with the other blanket authorizations, has a dampening effect on domestic natural gas exploration has been adequately considered in this docket and others. Producers have failed to present any evidence on rehearing to convince the ERA to change its position.

Producers' argument that if the enforcement of the NGA is to remain workable, Order 209 must be conditioned to require resale certificate authorization from the FERC is no more persuasive on rehearing than it was initially. Producers have failed to demonstrate that the ERA made an error when it concluded that gas would not flow in interstate commerce under Order 209 without appropriate FERC certification. Producers' rehearing request failed to demonstrate that the ERA erred by refusing to condition the authority granted in Order 209 to prohibit the use of two-part rates by TGMI. The purpose of blanket authorization is to allow importers to participate in the spot and short-term market. It is up to the buyers and sellers in spot market transactions to determine how the commodity should be priced. Canadian gas participates in the short-term, spot market no differently than domestically produced gas. Two-part rates are applied to domestically produced

gas. Distinctions between rate structures relate to many factors, including services rendered by the pipelines, but not to the source of the gas supply. The ERA will not discriminate against Canadian gas by imposing conditions requiring different rate treatment from domestic gas. The California sequencing rule example of a pipeline's incremental purchasing decisions used by Producers to support its proposed one-part rate condition request is not relevant. The California Public Utility Commission appropriately regulates how gas is to be sold in intrastate commerce in California. ERA has not been convinced that it should intervene in the jurisdiction of another regulatory body.

Producers reassert their argument that failure to impose a definite start-up date for the two-year term granted in Order 209, in effect, grants TGMI the authorization to import natural gas at any time in the indefinite future, thereby imperiling the development of domestic supplies. Producers have offered no new information to change ERA's position that the two-year term limitation and quarterly reporting requirements imposed by Order 209 are adequate safeguards of the public interest with respect to this action.

6. Producer's Request For Discovery Was Properly Denied

Producers contend that the ERA erred in failing to follow its regulations in seeking more detailed information concerning the proposed import and in failing to permit discovery of such facts by the Producers. Producers seek discovery of information as to: (1) the identity of the parties to TGMI's proposal; (2) the competitive effects of the proposed import on domestic producers; and (3) whether the imported gas is needed and cannot be supplied more economically from domestic sources.

The ERA's decision in Order 209 was based upon the entire record in this proceeding which is available to all parties. The ERA has concluded that the record is adequate to support its decision and will not entertain Producers' request for discovery. If Producers believe that the record is inadequate, they have the right to seek judicial review of the ERA's decisionmaking process.

The first and second categories of information which Producers seek to discover from TGMI relate to matters that reflect Producers' differing policy perspective rather than undisclosed and relevant facts. As previously stated in this order in Section IIA3, the public interest inquiry into the competitiveness of an import proposal does not focus on the competitive effect of an arrangement on domestic producers nor on whether the gas can be supplied more economically by another supplier in a particular instance. Rather, it

focuses on the responsiveness of the overall arrangement to market changes. Need is presumed in an import arrangement found to be competitive. The information necessary to determine whether TGMI's import proposal is inconsistent with the public interest is in the record.

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

Producers argue that an environmental impact assessment must be prepared to meet NEPA requirements even though only use of existing facilities is contemplated under Order 209. Producers state that: "the subject order entails a very substantial environmental impact with the authorization of up to 73 Bcf of gas over a two-year period." 17/

Producers contend that DOE environmental regulations specify that an environmental assessment (EA) normally must be conducted in cases which do not involve new construction. Among the factors that Producers contend the ERA must consider in performing its environmental evaluation are the secondary socio-economic effects of the proposed import. The ERA has considered this argument previously18/ and concluded, on the basis of facts not significantly different from the facts involved in Order 209, 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 EIS is prepared. In uncertain cases, an 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. Moreover, 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.

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

Producers' request that a stay of Order 209 be granted pending judicial review. Producers present no reason other than an inference that they may file a law suit in this matter and therefore have provided no information in their rehearing request that would persuade the ERA that a stay of TGMI's import authorization at this time is necessary or appropriate.

B. Conclusion

The ERA has determined that the Producers' application for rehearing presents no information that would merit reconsideration of our findings in Order 209. Accordingly, this order denies Producers' request for rehearing and request for stay of the subject order.

ORDER

For the reasons set forth above, pursuant to Sections 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. 209 filed 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 & 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 February 10, 1988.

--Footnotes--

1/ Texaco Gas Marketing, Inc., 1 ERA Para. 70,740.

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 & 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/ 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 No. 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.

4/ 49 FR 6684, February 22, 1984.

5/ Energy Security, A Report To The President of the United States, DOE/S-0057 (March 1987) at 124-125.

6/ 42 U.S.C. 4321, et seq.

7/ 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); Enron Gas Marketing Inc., 1 ERA Para. 70,676 (November 6, 1986); Minnegasco, Inc., 1 ERA Para. 70,721 (September 21, 1987); Minnegasco, Inc., Rehearing Denied, 1 ERA Para. 70,738 (November 20, 1987); Texas Eastern Transmission Corporation, 1 ERA Para. 70,733 (October 30, 1987); Texas Eastern Transmission Corporation, Rehearing Denied, 1 ERA Para. 70,744 (December 30, 1987); and Mobil Gas Company Inc., 1 ERA Para. 70,745 (January 6, 1988).

8/ Id.

9/ Id.

10/ 42 U.S.C. 7174.

11/ Mr. Hughes was a member of the Federal Energy Regulatory Commission from September 8, 1980, to July 13, 1984. Mr. Plumb served as Secretary of the Commission from its inception on October 1, 1977, until his retirement in 1987.

12/ Mr. Wilson is President of Gas Acquisition Services, Inc. Producers attached a statement by Mr. Wilson to their motion to intervene in this docket in which he expresses his opinion that, in general, additional imports of Canadian gas are not needed in U.S. markets, and open access to gas markets is needed by domestic producers to be competitive.

13/ See supra note 5.

14/ See supra note 3.

15/ See supra note 5, at 126.

16/ Hadson Gas Systems, Inc., FERC Docket No. RM86-19-000. In August 1986, the FERC initiated a generic rulemaking proceeding in this FERC docket to examine the potential anti-competitive impact on natural gas markets of interrelationships between non-jurisdictional marketing affiliates and the pipelines.

17/ Request of the Producers Associations for Rehearing, at 24.

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); Bonus Energy, Inc., 1 ERA Para. 70,702 (May 26, 1987); and (Texas Eastern Transmission Corporation, 1 ERA Para. 70,744 (December 30, 1987); Mobil Gas Company Inc., 1 ERA Para. 70,745 (January 6, 1988).

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 vs. Rumsfield, 418 F. Supp. 1302 (ED Pa. 1976); and 40 CFR Sec. 1508.14.