Cited as "1 ERA Para. 70,798"

ANR Pipeline Company (ERA Docket No. 86-63-NG), May 25, 1988.

DOE/ERA Opinion and Order No. 216-A

Order Denying Rehearing and Stay of Order

I. Background

On January 22, 1988, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 216 (Order 216) 1/ to ANR Pipeline Company (ANR) in ERA Docket No. 86-63-NG, which amended an authorization to import up to 75,000 Mcf per day of Canadian natural gas originally granted to Michigan Wisconsin Pipe Line Company, the predecessor company of ANR, in DOE/ERA Opinion and Order No. 32 (Order 32).2/ Order 216 extended the previous authorization from October 31, 1987, through October 31, 1994, under the terms of a renegotiated contract. Order 216 also approved for a two-year term a new special marketing agreement between ANR and its Canadian supplier, ProGas Limited (ProGas). This agreement permits ANR to sell imported gas not needed for system customers on the spot market at freely negotiated competitive prices.

A joint motion to intervene by ten producer associations (Producers) 3/ representing several thousand independent producers, royalty owners, and marketers of domestic natural gas, opposed the application. Producers requested summary denial of the application, or alternatively, requested that the ERA either hold a trial-type hearing or impose two conditions on the authorization. The conditions would require that ANR and any other pipeline transporting the imported gas become open-access transporters under the Federal Energy Regulatory Commission's (FERC) Order No. 436 (as amended by Order No. 500) program4/ and would prohibit ANR from importing the gas under a two-part demand/commodity rate structure. Producers also requested the ERA to authorize the conduct of discovery, alleging that additional information was needed to (1) determine the cost basis of ProGas' demand charge; (2) determine the competitive effects of the proposed import on domestic producers; and (3) develop data to test the reasonableness of ANR's claim that the imported gas is needed and cannot be supplied more economically from domestic sources.

Order 216 denied Producers' request for summary denial of the application, a trial-type hearing, imposition of conditions on the authorization, and discovery, and approved ANR's application to amend its import authorization.

Producers filed an application for rehearing of Order 216 on February 22, 1988. The application also sought a stay of the order pending judicial review. On the same day, ANR filed a motion asking the ERA to clarify Order 216 by declaring that the authorization would not be affected if it substituted Midwestern Gas Transmission Company (Midwestern) for Great Lakes Gas Transmission Company (Great Lakes) to transport the ProGas volumes from the Canadian border at Emerson, Manitoba to ANR's facilities.5/ On March 15, 1988, ANR submitted a letter which answered an ERA inquiry about its request for clarification and presented arguments for denying rehearing.

By notice dated March 22, 1988, the ERA extended the rehearing decision period to give all parties an opportunity to comment on the pleadings. Only ProGas and Producers filed comments. In a subsequent filing, Producers replied to ProGas' comments.

ProGas' comments filed after our March 22 notice focused on Producers' request for rehearing, specifically, that it be denied because Producers failed to support their arguments that the import authorization is in error. ProGas also requested the ERA to clarify that the gas purchased under Order 216 may be transported on Midwestern's pipeline system.

Producers' initial response to our March 22 notice commented on ANR's request for clarification and stated that ANR must amend its application before any change in the transportation arrangements and import point can be authorized. In this same filing, Producers alleged, regardless of whether any actual volumes were imported between the time ANR's original import authority granted in Order 32 expired and Order 216 was issued, ANR performed an unauthorized importation because of a standby service arrangement between ANR and ProGas.

In their later reply to ProGas' comments, Producers challenged the ERA's reliance on the DOE's natural gas import policy guidelines6/ to review ANR's application, the competitiveness of key provisions of the gas sales contract, and ProGas' arguments against imposing conditions on the import and conducting an environmental assessment.

Order 216 authorized ANR to import gas from ProGas at Emerson. Since the pipelines of Great Lakes and Midwestern each interconnect at Emerson with the facilities of ProGas' Canadian transporter, TransCanada PipeLines Limited, using Midwestern's existing facilities as a replacement for Great Lakes would not alter the entry point for the import and, therefore, is not inconsistent with the present authorization. The ERA accepts ANR's notice of change of transporter as a report of contract amendments under Section 590.407 of the

ERA's administrative procedures that does not require amending the authorization.

II. Producers' Allegations of Error

In support of their request for rehearing, Producers argue that the ERA erred by: (1) relying on the DOE natural gas policy guidelines 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) failing to consider the anti-competitive effects of the order without adequate conditions to protect against long-term harm to domestic supplies; (6) permitting ANR to recover take-or-pay settlement costs in its demand rates when such treatment is not allowed for domestic take-or-pay settlements; (7) permitting ANR to guarantee ProGas a 2.75 percent market share thereby preventing future price competition with domestic supplies through 1992; (8) failing to follow its own regulations regarding the information that must be disclosed to permit adequate public discussion of the applicant's proposal; (9) failing to conduct the trial-type hearing requested by Producers; (10) failing to permit discovery of facts central to the ERA determinations; (11) failing to consider the cumulative effects of ANR's blanket import authority and other blanket authorizations already granted by the ERA; (12) failing to conduct an environmental assessment, or to otherwise meet the requirements of the National Environmental Policy Act of 1969 (NEPA);7/ and (13) granting import authority retroactively, contrary to Section 3 of the Natural Gas Act (NGA),8/ to cover the period from October 31, 1987, to January 22, 1988, when ANR's original authority expired.

III. Decision on Rehearing and Stay

The arguments underlying most of the alleged errors 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, and have been rejected.9/ Producers have submitted no information in their request for rehearing which would compel the ERA to reconsider the positions it has taken on these issues. Therefore, we will not revisit all of Producers' arguments in this order, but instead we will focus on those issues that the ERA considers important to emphasize again and the new arguments which Producers raised.

A. Discussion of Issues

1. The ERA Can Rely On The Secretary's Guidelines.

Producers have presented no new information which would cause the ERA to reconsider its rejection of their argument made many times over that the policy guidelines are a nullity and cannot be relied on in issuing Order 216, nor do they distinguish the facts underlying Order 216 in any significant respect from previous cases in which this argument was rejected. In Panhandle Producers and Royalty Owners Association v. ERA (Panhandle Producers), the U.S. Court of Appeals for the D.C. Circuit reviewed the DOE policy guidelines as applied by the ERA in approving a particular gas import arrangement, a review that encompassed most of the major material issues raised by Producers in this docket, and upheld the guidelines and the ERA's reliance on the rebuttable presumptions which the guidelines established.10/

As part of their challenge to the ERA's reliance on the policy guidelines, Producers again claim that the DOE failed to comply with Section 404 of the Department of Energy Organization Act (DOE Act) 11/ 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 12/ attesting to the lack of a formal Commission vote. Section 404 provides that in cases in which the Secretary proposes "rules, regulations, and statements of policy of general applicability" in areas of DOE's jurisdiction, "[he] shall notify the [FERC] of the proposed action." If the FERC, "in its discretion," determines that the "proposed action may significantly affect any function within" its jurisdiction, the Secretary "shall immediately refer the matter to the [FERC], which shall provide an opportunity for public comment." The provision establishes a general mechanism for consultation between the agencies. The specific mechanisms agreed to by the ERA and the FERC to carry out this consultative process were never intended to be second guessed by private parties. As we indicated in Order 216, the FERC participated in developing the guidelines. We note that the FERC stated in its amicus brief 13/ filed pursuant to an order of the court in Panhandle Producers with respect to whether the complainant had standing to assert an alleged violation of Section 404:

> Before adopting its policy statement and associated Secretarial delegation orders, DOE circulated drafts to the FERC and engaged in a process of informal coordination with the Commission. The Commission was thus aware that the policy was under consideration and took no action at the time under Section 404. Moreover, since the issuance of the guidelines, the Commission has consistently and expressly acknowledged and followed the guidelines in the relevant cases before it. See, e.g.,

Natural Gas Pipeline Company of America, 37 FERC Para. 61,215 (1986); Northwest Alaskan Pipeline Company, 29 FERC Para. 61,302 (1984).

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

Producers offer no new argument or information to support 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. In addition, their argument relies on a former delegation order that has been superseded by Delegation Order No. 0204-111 as explained in the policy guidelines and therefore is no longer a valid precedent nor binding on the ERA. Their argument also ignores the explicit and opposite finding of the court on this issue in Panhandle Producers.14/ In making its determination in Order 216, the ERA considered and weighed all the information provided by the parties to the proceeding, considered precedent, and acted in accordance with statute, delegation order, and policy.

3. The Record Shows That The Proposed Import Will Provide A Competitive, Needed, and Secure Supply Of Gas.

As part of their rehearing request, Producers attached a statement by David W. Wilson, president of Gas Acquisition Services Inc. and former president of the Independent Petroleum Association of Mountain States, to rebut ANR's claims that the gas will be priced competitively and is needed. Mr. Wilson argues, and on the basis of his statement Producers argue, that, in general, gas exploration and development in the U.S. has suffered as a result of Canadian imports, more imports are not needed, and domestic producers are prevented from competing with Canadian gas because of the lack of widespread open access transportation by interstate pipelines. Additionally, he argues that Canadian and domestic gas supplies do not compete on an equal footing because of the preferential rate treatment given to imports, despite FERC Order No. 256.15/ Mr. Wilson also contends that Canada is an unreliable supplier because during past shortages in the U.S. the Canadian Government limited gas exports and the price has always been higher than domestic wellhead prices. Further, he alleges that the ERA is not complying with the U.S.-Canada Free Trade Agreement signed by the President on January 2, 1988, and now awaiting Congressional approval, by giving Canadian imports an unfair competitive advantage over domestic gas.

The ERA has examined Mr. Wilson's statement either in identical form or with some variations in other proceedings.16/ Just as in previous cases, his statement does not offer relevant information to support Producers' arguments

and to rebut the presumption of need and the finding of competitiveness. It is important to emphasize, however, that 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 216, the ERA determined that the terms of the amended sales contract between ANR and ProGas, when considered in the aggregate, including the special marketing provision to sell surplus system supply in the spot market, provide for a flexible and market-responsive import arrangement. Therefore, the gas is competitive and needed within the meaning of Section 3 of the NGA and DOE policy.

Producers object to the two-part rate and take-or-pay provisions in the revised contract between ANR and ProGas. These terms have been freely negotiated by the parties as an essential part of the import arrangement. The ERA has consistently approved two-part rate structures for imports since they are used by domestic pipeline suppliers of gas and reflect and serve legitimate ratemaking concerns.17/ Although we approve the rate structure of ANR's arrangement, it is within the FERC's jurisdiction to examine the specific cost elements contained in that structure. If ANR's allocation of take-or-pay settlement costs between the demand and commodity components of the rate does not comply with the FERC's rules, or with FERC Opinion No. 500,18/ or if ANR's allocation of costs in the demand charge does not comply with FERC Order No. 256,19/ the FERC is the proper forum to request appropriate action. Therefore, the ERA sees no reason to reconsider the conclusion reached in Order 216 that the pricing formula will not inhibit competition. It is important to note that the contract does not address how take-or-pay settlement costs are to be recovered in ANR's rates. Producers have not demonstrated that ANR's take-or-pay obligation is anti-competitive. Take-or-pay clauses are present in most natural gas contracts. They provide assurance to the supplier of a certain minimum income flow in cases involving a long-term supply commitment. ANR's current take-or-pay exposure, which is subject to annual renegotiation, is considerably less burdensome than under the previous contract if there is a decline in sales on its system. There is no liability for a fixed amount of gas, rather the quantity that ANR must take from ProGas will be automatically and proportionately reduced if ANR's overall system demand is reduced.

By virtue of Mr. Wilson's statement, Producers assert that Canadian

suppliers are not reliable because of their historical nationalistic approach to energy sales including the Canadian Government's previous regulation of natural gas export prices and the establishment, from time to time, of high national reserve requirements applicable to its natural gas export policy. However, past governmental trade barriers described in the statement do not constitute evidence that Canadian suppliers of gas are unreliable. The ERA considers Canadian natural gas to be a secure and reliable source of supply because of the large proven natural gas reserves in Canada, the availability of gas pipeline transportation to the U.S. border, and the reasons discussed below in Section III.A.4. of this order. Further, Producers have not provided any evidence that ProGas, in particular, is not a reliable supplier.

The Wilson statement also raises the question of whether the ERA's import authorizations are consistent with the U.S.-Canada Free Trade Agreement. The ERA believes that its import and export policies have and will continue to provide free and open natural gas trade with Canada and, in keeping with the Free Trade Agreement's energy provisions, provide the basis for the private sector to make decisions about energy trade without fear of undue government interference. Further, the present ERA policies coincide with DOE's energy policy objectives to provide consumers with a greater choice among dependable energy sources and to assure domestic producers greater certainty about investment decisions. The ERA's position is rooted in the belief that a greater security of energy supply can contribute to market expansion, enhance opportunities for all producers, and contribute to the long-term stability of the national economy. Mr. Wilson's statement presents no evidence to convince the ERA that it has erred. It merely disagrees with the ERA's, DOE's and the Administration's policies on imported natural gas.

4. Order 216 Is Not Inconsistent With The Secretary Of Energy's Statement On Lack Of Open Access Transportation.

Producers argue that Order 216 fails to conform to "recent findings" by the Secretary of Energy regarding the lack of a competitive domestic market. Although they did not recite which findings, since Producers have raised this issue in other proceedings,20/ we assume they are referring to the Secretary's March 1987 report on energy security21/ which expresses concern that willing buyers and sellers cannot always deal directly with each other because of lack of open access to transportation. In this case, as before, Producers have taken the Secretary's statement out of context. We agree that lack of open access transportation inhibits competition, but it is a problem that affects both domestic and Canadian suppliers. For this reason, the DOE has supported the open access transportation program established by FERC Order Nos. 436/500,22/ which does not differentiate based on source of supply, and DOE

also has proposed mandatory contract carriage legislation. Order 216 is not inconsistent with the Secretary's statement on open-access transportation.

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.23/

With respect to Mr. Wilson's 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. Producers offer no evidence to support this allegation and further, we note that this alleged affiliate problem, if it exists, is subject to an ongoing FERC proceeding in which discrimination charges involving affiliated relationships are being examined.24/

5. Conditioning Of Order 216 Is Not Needed.

In their application for rehearing, Producers repeat their request for imposition of the two conditions denied in Order 216 and specified in Section I of this order and request two additional conditions. Producers have provided no information to convince the ERA that it should reconsider its decision to deny the two original conditions.

One of the original conditions would require that ANR and any other pipeline transporting the imported gas become open-access transporters under FERC Orders 436/500. Producers maintain, as they have in previous proceedings that pipelines will not make transportation available to domestic producers in a way that would allow them to compete with Canadian imports. The Department agrees that nondiscriminatory access to available pipeline capacity "will facilitate the development of an orderly, competitive natural gas market." 25/

This Administration is committed to removing government impediments that prevent market forces from being the principal factor in natural gas consumption or production decisions, and ensuring that neither the U.S. nor the Canadian government gives domestically produced energy preferential treatment in their respective markets. The ERA recognizes that domestic

producers are adversely affected by lack of open access transportation to their markets, as are their Canadian counterparts. The distortions caused by the transition to open access transportation, however, affect both domestic and Canadian gas producers. It would be discriminatory to impose an open-access condition on imported, but not on domestic supplies. Such a requirement would be inconsistent with the DOE's commitment to equal treatment, competition, and free negotiation in U.S. gas trade.

We are aware of the difficulties experienced by both domestic and Canadian gas producers due to lack of open access to markets. Unfortunately U.S. and Canadian producers are caught in a transition period between a regulated and a free market. The Administration through legislation has attempted, but not yet succeeded, in achieving its goal of ensuring open-access transportation by pipelines.26/ Nonetheless, the Administration's resolve has not diminished, because it recognizes that open access to transportation is key to ensuring fair competition in the natural gas marketplace. In reaffirming his commitment to this goal, President Reagan, in his 1988 Legislative and Administrative Message to Congress, urged the Congress to decontrol natural gas at the wellhead and "provide for open access pipeline transportation." In support of this Administration policy, we encourage all importers to use open-access transportation, to the extent possible, and thus reduce barriers to competition and encourage the establishment of a fully competitive North American natural gas market.

The two new conditions requested would (1) fix a date certain to begin the two-year term for ANR's special marketing sales, and (2) would require ANR and "unnamed others" to obtain certificate authorization from the FERC to make sales for resale in interstate commerce. The ERA has considered and denied these new conditions as part of Producers arguments in other, unrelated proceedings.27/ For the reasons discussed below, we are again rejecting them.

First, Producers contend that, where the ERA grants a two-year term for spot market sales 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. The ERA believes the flexibility built into the commencement date simply acknowledges that the holder of short-term, blanket authority cannot predict spot market opportunities and, in order to participate successfully in the spot and short-term market, it must have authority in place. In addition, while ANR cannot predict when contract demand might decline, the availability of the blanket authority allows it to balance import requirements and to keep take-or-pay obligations at a minimum. Regardless of when the two-year term begins, however, if the price of the gas is not competitive with other

available sources it will not be sold, and, further, the two-year limitation is sufficiently short to ensure that no one is locked into an arrangement that cannot respond to unanticipated market changes. Nevertheless, the reporting requirements that the ERA has imposed on ANR ensure that interested parties may review individual spot market transactions and notify the ERA if they find that the reports indicate that the existing authorization conflicts with the public interest.

Second, Producers seek a condition requiring ANR and any spot-market customer for whom ANR would serve as an agent in importing gas under the special marketing agreement to obtain from the FERC a certificate of public convenience and necessity to make sales for resale in interstate commerce. Since it is clear that gas would not flow in interstate commerce under this import authorization without appropriate certification, there is no need for the condition requested by the Producers.

6. Producers' 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 failing to permit discovery of such facts by the Producers. The ERA's decision in Order 216 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.

In essence, the information which Producers seek to discover from ANR relates to matters that reflect Producers' differing policy perspective rather than undisclosed and relevant facts. As previously stated in Section III.A.3. of this order, the public interest inquiry into the competitiveness of an import proposal focuses on whether the arrangement is competitive in the marketplace and on its responsiveness to market changes and the resulting benefits to the consuming public. Need for the gas is presumed if an import arrangement is found to be competitive. The information necessary to determine whether ANR's import proposal is inconsistent with the public interest is in the record, and the ERA is not persuaded that it should reconsider its position on Producers' discovery request.

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

Producers again argue that an environmental impact assessment must be prepared to meet NEPA requirements and comply with the DOE's implementing environmental regulations even though the import authorized by Order 216 does not involve construction of new facilities. Producers state that the volumes authorized entail a substantial environmental impact. In performing an environmental evaluation Producers contend the ERA must consider the secondary socio-economic effects of the proposed import.

The ERA has considered Producers' arguments previously28/ and concluded, on the basis of facts not significantly different from the facts involved in Order 216, that the argument is without merit. The DOE guidelines for NEPA compliance29/ 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 was written in this instance supporting the conclusion that, because existing pipeline facilities will be used without the need for new construction, approving ANR's import proposal would have no significant impact on 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.30/

8. Producers Are Not Entitled To A Trial-Type Hearing.

Producers argue that, in addition to the issues listed in their intervention, they are entitled to a trial-type hearing on the basis of five new "unresolved facts" regarding (1) the actual price ANR will be paying for the imported gas, (2) whether domestic producers will have access to ANR's markets throughout the authorization term, (3) whether ProGas' minimum purchase requirements will result in ANR compelling customers to purchase Special Purchase Gas instead of domestic spot market gas, (4) referral of the 1984 policy guidelines under Section 404 of the DOE Act, and (5) the impact of ANR's import on the cross-crediting policies under FERC Order No. 500.31/

Section 590.313 of the ERA's administrative procedures provides for a trial-type hearing when a party has demonstrated there are factual issues in dispute, relevant and material to a decision, and that a trial-type hearing is necessary for a full and true disclosure of the facts. No party is entitled as a matter of right to a trial-type hearing for policy or legal issues.

The ERA has examined the additional issues raised by Producers in their rehearing motion and concludes that, although the concerns are presented as factual issues and all but issue (4) can be construed as relating to the competitiveness of ANR's import proposal, Producers have not met the requirements of Section 590.313. Producers challenge the import from the perspective of their own policy goals, not in terms of the policy framework established by the ERA, and for this reason the issues are less factual than policy in nature. In addition, all issues but issue (4) not only request factual responses that are impossible to provide at this time but, more important, their resolution is not material to the ERA's public interest decision in this proceeding. The pricing terms of ANR's agreement with ProGas (issue (1)) are flexible and actual future prices, including the price of any Special Purchase Gas, will fluctuate over time in response to changes in the market. Moreover, the price for gas imported under the special marketing arrangement will not be arrived at until ANR negotiates spot market sales, and then the price will be based on mutual agreement between the parties. Issue (2)--access to markets--cannot be answered. The Producers' access to markets depends upon the availability of transportation and the competitiveness of their supplies in the marketplace. In this regard, and as noted in Section III.A.4. of this order, the DOE endorses the FERC's voluntary open access transportation program. However, since neither the FERC nor the DOE is presently in a position to predict when open access will be complete, a trial-type hearing will not provide enlightenment. We note that ANR is providing open-access transportation on an interim basis under Section 311 of the Natural Gas Policy Act. In addition, of the six other major interstate pipeline systems serving ANR's market, four are completely open under blanket certificates and only two main closed.32/ In issues (3) and (5) Producers speculate vaguely and without support, suggesting in the first instance that ANR would apply improper pressure on its customers to purchase spot gas from ANR rather than domestic suppliers, and in the second instance, that ANR's import would have some negative impact on the cross-crediting mechanism adopted in FERC Order No. 500. Producers offer no evidence in either matter of a material factual issue genuinely in dispute and, moreover, fail to demonstrate their relevance to the ERA's public interest inquiry. We also note that FERC Order No. 500 does not distinguish between imported and domestic supplies of gas in the application of the cross-crediting mechanism. Issue (4) reflects Producers' different interpretation of Section 404 of the DOE Act. This is a matter of law and policy, not fact. This concern has been discussed above in Section III.A.1. and the ERA does not believe that Producers have demonstrated that further illumination of this issue or the other four would be aided materially by a trial-type hearing nor 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 opportunity

to comment on the proposed arrangement and the parties' positions on the issues. Any facts presented to support those positions are adequately represented in the record to provide the ERA with a sufficient basis on which to make a decision. Accordingly, the ERA has determined that a trial-type hearing would not be in the public interest and this basis of error also is without merit.

9. Order 216 Is Not A Retroactive Import Authorization Prohibited by Section 3 of the NGA.

Producers asserted in their rehearing petition that the ERA may not grant Section 3 import authorizations retroactively and therefore the ERA should investigate whether ANR violated the NGA by importing gas between the time its original authority granted in Order 32 expired on October 31, 1987, and Order 216 was issued. In their subsequent response to the ERA's March 22 letter, Producers modified this assertion to argue that an unauthorized importation during this time period had occurred because of a standby service arrangement that existed between ANR and ProGas and entailed payment of demand charges by ANR to ProGas.

Retroactivity is not at issue here. ANR did not import any of the gas in question during the time its application was pending decision, including the interim period.33/ A standby service arrangement, contrary to Producers' assertion, is not an import.

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

Producers request that a stay of Order 216 be granted pending judicial review. Producers present no reason other than to infer that they may file a lawsuit in this matter and therefore have provided no information in their rehearing request that would persuade the ERA that a stay of ANR's import authorization at this time is necessary or appropriate.

B. Conclusion

The ERA has determined that Producers' application for rehearing presents no information that would merit reconsideration of our findings in Order 216. 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. 216 filed jointly by the California Independent Producers Association, the East Texas Producers & Royalty Owners Association, the Energy Consumers and Producers Association, the Independent Oil & Gas Association of New York Inc., the Independent Petroleum Association of America, the Independent Petroleum Association of Mountain States, the Independent Petroleum Association of New Mexico, the North Texas Oil & Gas Association, the Panhandle Producers and Royalty Owners Association, and the West Central Texas Oil and Gas Association are hereby denied.

Issued in Washington, D.C., on May 25, 1988.

--Footnotes--

1/ ANR Pipeline Company, 1 ERA Para. 70,748.

2/ Michigan Wisconsin Pipe Line Company, et al., 1 ERA Para. 70,530 (April 24, 1981).

3/ The producer associations include the California Independent Producers Association, the East Texas Producers & Royalty Owners Association, the Energy Consumers and Producers Association, the Independent Oil & Gas Association of New York Inc., the Independent Petroleum Association of America, the Independent Petroleum Association of Mountain States, the Independent Petroleum Association of New Mexico, the North Texas Oil & Gas Association, the Panhandle Producers and Royalty Owners Association, and the West Central Texas Oil and Gas Association.

4/ The FERC's Order No. 436 established a voluntary program under which a pipeline agrees to provide non-discriminatory transportation for all customers in return for blanket certificate authority. 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 readopting the open-access provisions of Order No. 436 and modifying or adopting certain other provisions, including a take-or-pay crediting mechanism. FERC Statutes and Regulations Para. 30,761. Order No. 500 became effective September 15, 1987. Interim rules adopted in FERC Order Nos. 500-B issued October 16, 1987 (FERC

Statutes and Regulations Para. 30,772) and 500-C issued December 23, 1987 (FERC Statutes and Regulations Para. 30,786) made minor modifications to the take-or-pay crediting mechanism. The FERC held a public hearing on April 11 and 12, 1988, for oral presentation of views on Order No. 500.

5/ Midwestern has pending before the FERC in Docket No. CP87-107-000 a December 1986 application to provide transportation service to ANR.

6/ 49 FR 6684, February 22, 1984.

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

8/ 15 U.S.C. Sec. 717b.

9/ See e.g., Panhandle Producers and Royalty Owners Association v. ERA, 822 F.2d 1105 (D.C. Cir., June 30, 1987); EnTrade Corporation, 1 ERA Para. 70,761 (March 3, 1988), rehearing denied, unpublished (May 5, 1988); Mobile Gas Company Inc., 1 ERA Para. 70,745 (January 6, 1988), rehearing denied, 1 ERA Para. 70,760 (March 7, 1988); Texaco Gas Marketing, Inc., 1 ERA Para. 70,740 (December 11, 1987), rehearing denied, 1 ERA Para. 70,756 (February 10, 1988); Texas Eastern Transmission Corporation, 1 ERA Para. 70,733 (October 30, 1987), rehearing denied, 1 ERA Para. 70,744 (December 30, 1987); Minnegasco, Inc., 1 ERA Para. 70,721 (September 12, 1987), rehearing denied, 1 ERA Para. 70,738 (November 20, 1987); Bonus Energy, Inc., 1 ERA Para. 70,691 (March 24, 1987), rehearing denied, 1 ERA Para. 70,702 (May 26, 1987) and Tennessee Gas Pipeline Company, 1 ERA Para. 70,674 (November 6, 1986), rehearing denied, 1 ERA Para. 70,684 (January 5, 1987).

10/ 822 F.2d at 1110.

11/ 42 U.S.C. 7174.

12/ 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.

13/ Supplemental Brief Of The Federal Energy Regulatory Commission As Amicus Curiae, February 5, 1987, at 7-8.

14/ 822 F.2d at 1111.

15/ In Opinion Nos. 256 and 256-A, the FERC held that for ratemaking purposes it would treat the component costs of Canadian gas sold to U.S.

purchasers in the same way as it would the component costs of gas purchased from domestic suppliers. Natural Gas Pipeline Company of America, 37 FERC Para. 61,215 (December 8, 1986), rehearing granted in part and denied in part, 39 FERC Para. 61,218 (May 27, 1987).

16/ See EnTrade Corporation, Order Denying Rehearing, unpublished (May 5, 1988); Mobil Gas Company, Inc., Order Denying Rehearing, 1 ERA Para. 70,760 (March 7, 1988); EnTrade Corporation, 1 ERA Para. 70,761 (March 3, 1988); Texaco Gas Marketing, Inc., Order Denying Rehearing, 1 ERA Para. 70,756 (February 10, 1988); and Texas Eastern Transmission Corporation, 1 ERA Para. 70,733 (October 30, 1987), rehearing denied, 1 ERA Para. 70,744 (December 30, 1987).

17/ See e.g., Tennessee Gas Pipeline Company, 1 ERA Para. 70,726 (October 9, 1987); Great Lakes Gas Transmission Company, Michigan Consolidated Gas Company, 1 ERA Para. 70,687 (February 27, 1987); Tennessee Gas Pipeline Company, 1 ERA Para. 70,654 (June 19, 1986); and Natural Gas Pipeline Company of America, 1 ERA Para. 70,645 (May 15, 1986).

18/ FERC Order No. 500 adopted a policy that permits open-access pipeline transporters to recover from 25 to 50 percent of take-or-pay buy-out or buy-down costs through a fixed charge if the pipeline is willing to absorb an equal share. Remaining amounts, if any, not to exceed 50 percent, may be billed through a commodity or volumetric surcharge.

19/ See supra note 15.

20/ See EnTrade Corporation, Order Denying Rehearing, unpublished (May 5, 1988); Mobil Gas Company Inc., Order Denying Rehearing, 1 ERA Para. 70,760 (March 7, 1988); Texaco Gas Marketing, Inc., Order Denying Rehearing, 1 ERA Para. 70,756 (February 10, 1988); Texas Eastern Transmission Corporation, Order Denying Rehearing, 1 ERA Para. 70,744 (December 30, 1987); and Minnegasco, Inc., Order Denying Rehearing, 1 ERA Para. 70,738 (November 20, 1987).

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

22/ See supra note 4.

23/ See supra note 21, at 126.

24/ On November 14, 1986, the FERC initiated a generic rulemaking

proceeding in FERC Docket No. RM87-5-000 to examine the potential anti-competitive impact on natural gas markets of interrelationships between non-jurisdictional marketing affiliates and interstate pipelines. FERC Statutes and Regulations Para. 35,520.

25/ See supra note 21, at 127.

26/ For example, section 4412 of the Administration's omnibus trade bill (S. 539, 100th Cong., 1st Sess., February 19, 1987) would provide for mandatory open access carriage.

27/ See EnTrade Corporation, 1 ERA Para. 70,761 (March 3, 1988), rehearing denied, unpublished (May 5, 1988); Mobil Gas Company Inc., 1 ERA Para. 70,745 (January 6, 1988), rehearing denied, 1 ERA Para. 70,760 (March 7, 1988); Texaco Gas Marketing, Inc., 1 ERA Para. 70,740 (December 11, 1987), rehearing denied, 1 ERA Para. 70,756 (February 10, 1988); and Texas Eastern Transmission Corporation, 1 ERA Para. 70,733 (October 30, 1987), rehearing denied, 1 ERA Para. 70,744 (December 30, 1987).

28/ See EnTrade Corporation, Order Denying Rehearing, unpublished (May 5, 1988); Mobil Gas Company Inc., Order Denying Rehearing, 1 ERA Para. 70,760 (March 7, 1988); Texaco Gas Marketing, Inc., Order Denying Rehearing, 1 ERA Para. 70,756 (February 10, 1988); Texas Eastern Transmission Corporation, Order Denying Rehearing, 1 ERA Para. 70,744 (December 30, 1987); Bonus Energy, Inc., Order Denying Rehearing, 1 ERA Para. 70,702 (May 26, 1987); and Tennessee Gas Pipeline Company, Western Gas Marketing, U.S.A., and Enron Gas Marketing, Inc., Order Denying Rehearing, 1 ERA Para. 70,684 (January 5, 1987).

29/ Department of Energy Compliance With the National Environmental Policy Act (NEPA); Amendments to the DOE NEPA Guidelines (52 FR 47662, December 15, 1987).

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

31/ Under FERC Order No. 500, natural gas producers must submit a signed offer of take-or-pay credits to an open access pipeline in order to make the producer's gas eligible for transportation, unless the pipeline agrees to transport the gas without an offer of credits.

32/ Natural Gas Pipeline Company of America, Northern Natural Gas Company, Panhandle Eastern Pipeline Company, and Trunkline Gas Company have accepted blanket open-access transportation certificates. Great Lakes Gas

Transmission Company and Midwestern Gas Transmission Company remain closed.

33/ See ANR's March 15, 1988, letter to the Director of the ERA's Natural Gas Division.