

Cited as "1 FE Para. 70,400"

Brooklyn Union Gas Company, et al. (ERA Docket Nos. 86-44-NG, 86-45-NG, 86-46-NG, 86-48-NG, 87-02-NG), January 16, 1991.

DOE/FE Opinion and Order No. 368-B

Order Denying Request for Rehearing

I. Background

On January 11, 1990, the Office of Fossil Energy (FE) of the Department of Energy (DOE) issued DOE/FE Opinion and Order No. 368 (Order 368) conditionally authorizing 18 Northeastern local distribution companies (LDC's) to import up to 397,100 Mcf per day of Canadian natural gas.¹ DOE made a preliminary determination the gas imports would not be inconsistent with the public interest. In particular, DOE preliminarily found the import arrangements would provide long-term, reliable supplies of needed natural gas on market-responsive terms. In addition, DOE found the imports would enhance the energy mix and diversify the sources of energy supplies available in the Northeast, thereby stimulating competition and promoting energy security. The authorizations were conditioned upon completion by DOE of a review of the environmental impacts of the construction and operation of the facilities proposed to import and transport the natural gas.

On February 12, 1990, DOE received requests from two intervening parties, the Independent Petroleum Association of America (IPAA) and the New England Fuel Institute and Empire State Petroleum Association (NEFI/ESPA), for rehearing of Order 368. DOE determined the rehearing requests were premature since Order 368 made only preliminary findings on the Brooklyn Union applications. Accordingly, DOE returned the filings and indicated all parties would have an opportunity to request rehearing upon a final determination on the applications.

Further material was added to the record of the Brooklyn Union proceeding after Order 368 was issued. First we added a letter to the Secretary of Energy, Admiral James D. Watkins, from Senators Johnston, Domenici, Bingaman, and Boren, of the U.S. Senate Committee on Energy and Natural Resources, regarding the proceeding; Admiral Watkins' reply letters; and responses to questions from Senators Johnston, Domenici, and Bingaman concerning Order 368 and DOE's natural gas import policy. Second, on November 6, 1990, IPAA submitted supplemental comments on DOE's responses to the Senators' questions, introduced various documents that were prepared for a related proceeding on Iroquois Gas Transmission System (IGTS) at the Federal Energy Regulatory Commission (FERC), and requested a trial-type hearing.

Subsequently, DOE completed its environmental review of the proposed facilities and, on November 15, 1990, issued DOE/FE Opinion and Order No. 368-A (Order 368-A), granting final authorization to the proposed import arrangements. In Order 368-A, DOE determined the arrangements would provide additional, long-term, secure supplies of competitively priced gas needed in the Northeast, and are, therefore, not inconsistent with the public interest.

II. Request for Rehearing

On December 17, 1990, IPAA filed an application for rehearing of Orders 368 and 368-A, and incorporated by reference their February 12, 1990,

rehearing request and their November 6, 1990, supplemental comments. IPAA specified numerous alleged errors in the DOE's decision to authorize the Brooklyn Union import arrangements. The errors alleged by IPAA are:

(1) failing to consider the anticompetitive effects of the proposed import structure;

(2) failing to apply the standards and criteria of the DOE's 1984 Policy Guidelines;

(3) failing to assess the need for the gas imports authorized by the subject orders;

(4) failing to conduct an evidentiary hearing as required by section 3 of the Natural Gas Act (NGA);

(5) departing, without explanation, from DOE's policy of imposing a two-year term on blanket import authorizations;

(6) failing to conduct a proper environmental review;

(7) failing to permit discovery of facts central to DOE's determinations;

(8) failing to consider the relative merits of this application compared with the alternative of importing natural gas for subsequent transportation on Northern Border pipeline;

(9) failing to condition the import authorizations upon the importers providing open-access transportation to their markets;

(10) failing to address the issues raised by the parties, including the arguments raised in IPAA's November 6 pleading;

(11) making factual findings without substantial evidence in the record;

(12) approving a set of less-than-arms-length transactions which harm the public interest;

(13) failing to consider the impact on the nation's balance of payments deficit; and

(14) failing to specify what record forms the basis for its decision.

Most of the alleged errors are simply restatements of arguments IPAA (or other intervenors) argued previously in this proceeding, concerning which the IPAA has not provided any new or relevant information, while other issues are raised here for the first time, although the original import applications were filed on August 1, 1986, and there have been numerous opportunities for interested parties to raise relevant issues since that date. DOE has considered carefully all of the arguments made by IPAA and is not persuaded to change its determination in Orders 368 or 368-A. The application for rehearing fails to overcome either the general presumption favoring import authorizations mandated by section 3 of the NGA or the substantial evidence in the record of this proceeding that the proposed imports would not be inconsistent with the public interest. Therefore, the application for rehearing is denied in its entirety. In the following discussion, DOE sets forth its views on IPAA's principal arguments.

III. Discussion

A. DOE considered whether the proposed arrangements would have anticompetitive effects.

IPAA asserts in its rehearing application the proposed import arrangements are anticompetitive and makes two arguments in support of the assertion. First, IPAA asserts Alberta Northeast Gas, Ltd. (ANE), the Canadian corporation established by the applicants (the Repurchasers) to purchase and resell the natural gas, is an unnecessary middleman serving an anticompetitive role. In this regard, IPAA disputes ANE's role as a supply aggregator and argues that ANE does not serve the public in any permissible manner. IPAA expresses concern over the ANE repurchase agreements with the individual Repurchasers, which IPAA explains assign specific volumes to each Repurchaser, thus linking the ANE supplier volumes to the individual Repurchasers. Citing *Klor's Inc. v. Broadway-Hale Stores, Inc.*,^{2/} IPAA submits that under this arrangement, ANE serves the private interests of its owners by creating a vertically imposed horizontal allocation of markets, which IPAA alleges is a per se violation of the nation's antitrust laws.

IPAA's concerns over ANE were addressed by FERC in related proceedings authorizing the construction of IGTS and other facilities to transport the ANE volumes to the Repurchasers.^{3/} DOE concurs with FERC that the public policies underlying the nation's antitrust laws should be considered in making a section 3 public interest determination,^{4/} but concludes there is no evidence in the record of this proceeding which demonstrates ". . . the potential for antitrust violations is sufficiently great to militate against (authorization) of the project." ^{5/}

As FERC concluded in Opinion No. 357, "to the extent IPAA argues that *Klor's Inc.* supports a finding that the actions of ANE and the Iroquois shippers constitute a per se violation of the antitrust laws, we find IPAA's reliance misplaced." ^{6/} Further, DOE supports FERC's reasoning that ". . . consideration of the public policies underlying the nation's antitrust laws does not mean that a proposal which may raise some antitrust concerns could not be found overall to be in the public convenience and necessity. Additionally, it does not demand that the Commission attach weight to the type of unsubstantiated anticompetitive claims which exist here. Our obligation is to weigh all unsubstantiated claims, together with all relevant factors, in exercising our responsibilities under the NGA." ^{7/}

DOE concludes the Brooklyn Union import arrangements do not have a sufficient potential for antitrust violations to warrant rehearing of the decision rendered in Orders 368 and 368-A. To the contrary, the ANE imports will enhance the energy mix and diversify the sources of energy supplies available in the Northeast, thereby stimulating competition and promoting energy security. Finally, if ANE or other participants engage in violations of antitrust laws, appropriate remedies are available under those laws.

The second argument advanced by IPAA in support of its contention the import arrangements are anticompetitive is that differences in the pipeline transportation rate designs utilized by FERC and the National Energy Board of Canada give Canadian gas an unfair competitive advantage. This issue was thoroughly examined in Order 368, as well as in numerous other proceedings before DOE (cited in Order 368).^{8/} DOE concluded the differences in rate design do not give Canadian suppliers an unfair competitive advantage. IPAA

has not provided any new evidence or relevant reason to revisit this issue.

B. DOE applied the standards and criteria of the 1984 Policy Guidelines.

IPAA alleges the import arrangements do not meet the criteria of DOE's natural gas policy guidelines,^{9/} in as much as the relationships between ANE and the Repurchasers are not arms-length, the demand charge used in the two-part rate constitutes a take-or-pay charge, and the pricing formula, which is tied to fuel oil prices, will not result in a competitive price in the current natural gas market. First of all, the relevant contracts are those between ANE and its Canadian suppliers (the ANE/Repurchaser contracts are merely reflections of the supply contracts) and these meet the policy guidelines criteria of arms-length transactions containing flexible, market-responsive terms. Second, in Order 368 DOE found the two-part rate design utilized in Canadian import arrangements is largely analogous to two-part rates found in domestic tariffs.^{10/} Accordingly, DOE does not consider the demand charge an anticompetitive take-or-pay charge in contravention of the import policy guidelines. Third, the pricing formula is a good faith attempt to achieve a price that will be competitive over the life of the import arrangements. To the extent unforeseen market developments result in the pricing formula not being market responsive, either party may invoke the renegotiation clause in the supply contracts. Finally, DOE reaffirms its conclusion in Orders 368 and 368-A: the import arrangements meet the criteria and standards of the import policy guidelines.

C. Brooklyn Union, et al., established a need for the gas imports.

IPAA argues the gas imports are not needed and DOE cannot rely on the import policy guideline's presumption of need because the Repurchasers failed to demonstrate that the import arrangements are competitive. As we stated in Order 368, "the gas purchase agreements were freely negotiated between the buyer and sellers and contain market-responsive, flexible pricing terms, renegotiation and arbitration clauses, and do not have any minimum take provisions. Accordingly, the proposed imports are presumed to be needed".^{11/} IPAA has not introduced any new relevant evidence into the proceeding rebutting this presumption. IPAA notes a DOE Report, "Energy Security, A Report to the President" (March 1987), which found willing buyers and sellers cannot always deal directly with each other, since pipelines generally control access to the transportation system. In this case the LDC's and the Canadian suppliers have negotiated, through ANE, arms-length import arrangements and the gas will be transported to the Repurchasers over IGTS, an open-access pipeline. Therefore, the access to pipeline transportation issue discussed in the March 1987 Report is not a factor in this proceeding.

D. IPAA's request for a trial-type hearing was properly denied.

IPAA asserts an evidentiary hearing is required by section 3 of the NGA, and they list five issues which they claim are factual disputes.^{12/} We disagree. There are no factual disputes that require a trial-type hearing. The first deals with the Repurchasers demand for the gas over the course of the import contracts. There is already ample evidence in the record of this proceeding, as well as in the related proceedings at FERC,^{13/} to support the conclusion in Orders 368 and 368-A the imported gas is needed. The other issues raised by IPAA in its rehearing requests are not factual issues at all but invitations to speculate on what the possible consequences of the import arrangements might be at some future time, and, as such, not proper issues for resolution in a trial-type hearing.

E. DOE's two-year limit on blanket import authorizations does not apply to these import arrangements.

IPAA claims DOE, in authorizing each Repurchaser to purchase additional volumes of gas if others of the Repurchasers do not utilize their full authorization, departed from its policy of limiting blanket authorizations to two-year periods. Pursuant to its blanket authorization program, DOE routinely grants authorizations to import and/or export natural gas and liquefied natural gas for sale under to-be-negotiated terms that will reflect market conditions. However, to ensure blanket authorizations are sufficiently flexible to respond to changes in market conditions, these authorizations have been limited to two-year periods. Because 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, the Brooklyn Union authorizations are fundamentally different from blanket authorization requests: the exporter is known, the import point is known, the pricing provisions and other contract terms are known, and the possible importers are limited to a known group all of whom have entered into a contract providing for the additional purchases. Therefore, the authorizations are not a departure from DOE's blanket import policy.

F. Order 368 and Order 368-A are based on evidence in the record that the Brooklyn Union imports are not inconsistent with the public interest, including the environmental aspects of the public interest.

IPAA asserts DOE/FE did not comply with the National Environmental Policy Act of 1969 (NEPA) 14/ and other environmental statutes. First, IPAA states the Final Environmental Impact Statement (FEIS) prepared by FERC was not adequate for DOE's purposes and that, among other things, DOE must decide between alternative points of importation. Second, IPAA asserts that DOE failed to comply with section 106 of the National Historic Preservation Act (NHPA).15/

IPAA does not provide evidence that undermines the substantial evidence in the record of this proceeding or the statutory presumption that supports the public interest finding in Orders 368 and 368-A. As part of its public interest determination, DOE weighed the effects of the import project on the environment. Order 368-A took into account the FEIS on the IGTS Phase I Project prepared by FERC, as well as conducting an independent review. Order 368-A found the environmental effects of the import project "are relatively minor and can be mitigated, and thus are environmentally acceptable, especially when balanced against the substantial economic benefits to be derived from the import arrangement in meeting current and future energy needs in the Northeast".16/ In conjunction with the issuance of Order 368-A, the DOE issued a Record of Decision,17/ pursuant to the regulations of the Council on Environmental Quality (40 CFR 1505.2) and the DOE's guidelines for compliance with NEPA, which documents the manner in which the DOE considered the environmental issues in its decision-making process.18/

G. Order 368 properly denied discovery.

IPAA asserts that DOE should have permitted discovery in the Brooklyn Union proceedings and supplies a list of issues on which discovery should have been allowed. We disagree. Although the IPAA had not requested discovery procedures at the time Order 368 was issued, the DOE, in response to a discovery request from NEFI/ESPA determined discovery was not necessary

because DOE could make its NGA section 3 determination based on the record before it. IPAA requests discovery on basically the same issues it earlier requested on a trial-type hearing. As we stated above, these are not factual issues, but rather invitations to speculate on what the possible consequences of the import arrangements might be at some future time. For these reasons, DOE will not grant rehearing for purposes of discovery.

H. DOE properly considered all reasonable alternatives.

To the extent IPAA argues that DOE must consider, as part of its non-environmental aspects of the public interest, the relative merits of IGTS compared to the alternative of importing natural gas for transportation on Northern Border pipeline, DOE disagrees. DOE considers those applications that are before it and, for NEPA purposes, all reasonable alternatives; it need not consider every imaginable alternative of transporting natural gas from point A to point B. To do so would be in contravention of DOE's policy to allow private individuals to negotiate and complete natural gas purchase arrangements with minimum governmental interference. Also, FERC, in its January 12, 1989, order affirming the final settlement certification in its Northeast "open season" proceedings, found that the IGTS project was discrete and not mutually exclusive vis-a-vis any other pipeline construction proposals.^{19/} DOE is justified in relying on FERC's determination of non-mutual exclusivity.

I. Orders 368 and 368-A properly refused to condition authorization upon open-access transportation.

Next, IPAA asserts the authorizations should be conditioned upon the Repurchasers providing open-access transportation to their markets. Similar requests for an open-access condition have been made previously in DOE proceedings, and before the D.C. Court of Appeals, and denied on the grounds that to require importers to become open-access transporters would unfairly discriminate against foreign gas supplies and lessen competition.^{20/}

J. Orders 368 and 368-A properly addressed relevant issues.

IPAA contends the issues raised by parties to this proceeding, including those raised in its November 6, 1990, pleading, were not adequately addressed by DOE. DOE disagrees. All relevant and material issues necessary to making a determination in this proceeding have been addressed.

K. Orders 368 and 368-A made all factual findings based on substantial evidence in the record.

IPAA claims that the Brooklyn Union order made factual findings without substantial evidence in the record on a number of issues. To begin with, IPAA relies heavily in making its arguments regarding unsubstantiated factual findings on Admiral Watkins' responses to Senatorial questions. As was stated in Order 368-A, those responses that are Brooklyn Union-related are no more than explanations of the preliminary determinations made in Order 368.^{21/} Admiral Watkins' responses were included in the record of the Brooklyn Union proceeding because they were related to that proceeding, those responses were not, however, a part of the decisional process in making the section 3 determination on the import applications. As to the issues raised by IPAA, the competitive effect of the differences in U.S. and Canadian rate design, the adequacy and the security of the gas supply, the incremental demand for the gas, and the prudence of the import transactions, the DOE's determinations on

these issues are all adequately supported by the record of this proceeding.

L. Orders 368 and 368-A considered those factors relevant to the public interest.

IPAA asserts the import authorizations will harm the nation's balance of payments deficit. Their argument is not relevant to DOE's determination in this proceeding. Section 3 presumes import arrangements are in the public interest. DOE policy recognizes that freely negotiated, flexible agreements between market participants will enhance efficiency and promote competition in the North American natural gas market. In this case, the imports will enhance the energy mix and diversify the sources of energy supply available in the Northeast, thereby stimulating competition and promoting energy security.

M. Order 368-A approves imports are based on arms-length negotiations.

IPAA contends the Brooklyn Union import arrangements approve less-than-arms-length transactions which harm the public interest. We noted above that the relevant contracts are those between ANE and its Canadian suppliers. Orders 368 and 368-A, based on the record in this proceeding, found that the proposed imports were not inconsistent with the public interest.

N. Orders 368 and 368-A are based on evidence in the record.

Finally, IPAA claims that several documents relied upon by the DOE in reaching its determination on the Brooklyn Union applications are not contained in the record of this proceeding. These include: (1) the Record of Decision, (2) the Rudden Report, (3) the CRS Connecticut Report, (4) the QED Report, and (5) the N.Y. Rudden Report.

First, the Record of Decision is included in the record and was published in the Federal Register in conjunction with notice of Order 368-A.22/ Second, the other four documents were specifically not relied upon by DOE in making its section 3 determination. NEFI/ESPA, in its filing of October 16, 1987, cited these reports as evidence that need for the proposed imports was subject to debate. In Order 368, we noted NEFI/ESPA's characterizations of these reports and stated:

The DOE does not feel it is necessary or an appropriate use of limited government resources to enmesh itself in the merits of the Rudden Report and the N.Y. Rudden Report versus the CRS Memorandum, the CRS Connecticut Report and the QED report or to schedule a Federal round of the DPUC forecasting methodology proceedings. What the DPUC hearings and the sundry studies ultimately show is that predicting future demands for natural gas is not an exact science and that, by applying different assumptions to varying situations, different conclusions as to need can be reached. The DOE does not believe that it can do a better job of prognosticating demand than the Repurchasers, which is the primary reason that the energy guidelines presume that a flexible, competitively-priced, freely negotiated sales agreement is the best way to ensure that the proposed gas supply will be needed (at 25, 26).23/

IV. Conclusion

DOE issued Orders 368 and 368-A after a thorough examination of whether the proposed import arrangements were consistent with the NGA section 3 public interest standard. DOE determined that the import arrangements would provide

additional, long-term, secure supplies of competitively priced natural gas needed in the Northeast and are, therefore, not inconsistent with the public interest, including protection of the environment.

The application for rehearing filed by IPAA does not contain any basis for DOE to reconsider its findings in this proceeding. IPAA neither rebutted the substantial record on which these findings were based nor rebutted the statutory presumption in section 3 that natural gas imports are consistent with the public interest. Therefore, IPAA's request for rehearing is denied.

Issued in Washington, D.C. on January 16, 1991.

--Footnotes--

1/ 1 FE Para. 70,285.

2/ 359 U.S. 207 (1959).

3/ See, Order Making Preliminary Determinations and Establishing Procedures, 52 FERC Para. 61,091 (July 30, 1990); and FERC Opinion No. 357 (November 14, 1990).

4/ Id., Preliminary Determinations, at 88.

5/ Id., Preliminary Determinations, at 89.

6/ Id., Opinion 357, footnote 120, at 82.

7/ Id., Opinion 357, at 83.

8/ Order 368, 20-23.

9/ 49 FR 6684, February 22, 1984.

10/ Order 368, at 22.

11/ Order 368, at 25.

12/ IPAA Rehearing Request, at 8 & 9.

13/ See, supra note 3.

14/ 42 U.S.C. 4321, et seq.

15/ 16 U.S.C. Para. 470(f).

16/ Order 368-A, at 8.

17/ 55 FR 48685, November 21, 1990.

18/ 54 FR 49337 (November 30, 1989). IPAA argues DOE did not comply with NEPA in issuing Order 368-A. A section 3 rehearing, however, is not the proper forum to consider compliance with the NEPA process. A section 3 rehearing reviews DOE's public interest determination, including the extent to which the determination took into account the environmental aspects of the public interest. A section 3 rehearing does not review procedural compliance with NEPA. DOE's compliance with the NEPA process is set forth in the Record of

Decision which represents final agency action on NEPA procedural matters. There is no provision for an administrative review (such as a section 3 rehearing) of a record of decision. See, 40 CFR Parts 1500-1508.

19/ 46 FERC Para. 61,012.

20/ See, *Panhandle Producers and Royalty Owners Association v. Economic Regulatory Administration*, 822 F.2d 1105 (D.C. Cir., June 30, 1987); *Bonus Energy, Inc.*, 1 ERA Para. 70,691 (March 24, 1987); *Tennessee Gas Pipeline Company*, 1 ERA Para. 70,674 (November 6, 1986); *Western Gas Marketing U.S.A., Ltd.*, 1 ERA Para. 70,675 (November 6, 1986); and *Enron Gas Marketing Inc.*, 1 ERA Para. 70,676 (November 6, 1986).

21/ Order 368-A, at 9.

22/ 55 FR 48685, November 21, 1990.

23/ *The Repurchasers*, in their response to NEFI/ESPA's October 16, 1987, filing, included copies of the CRS Report and the QED Report in the record of the proceeding. Although IPAA did not request leave to intervene in this proceeding until May 8, 1989, DOE regulations require late intervenors to accept the record of the proceeding as it was developed prior to the intervention. [10 CFR Para. 590,303(h)].