Cited as "1 ERA Para. 70,610"

Northridge Petroleum Marketing U.S., Inc. (ERA Docket No. 85-14-NG), November 27, 1985.

DOE/ERA Opinion and Order No. 88A

Order Denying Rehearing

I. Background

On September 27, 1985, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 88 (Order No. 88)1/ granting Northridge Petroleum Marketing U.S., Inc. (Northridge) a two-year blanket authorization to import up to an aggregate of 100 Bcf of Canadian natural gas for short-term sales to U.S. purchasers. The transactions that would occur under the authorization would be negotiated individually by Northridge and its purchasers, and would be reported to the ERA on a quarterly basis.

The Panhandle Producers and Royalty Owners Association (PPROA) filed an application for rehearing of Order No. 88 on October 28, 1985. The application also seeks a stay of the order pending rehearing. PPROA is a trade association of approximately 800 producers, royalty owners, and service companies in Texas, New Mexico, Oklahoma, and Kansas. PPROA argues (1) the ERA cannot rely upon the Secretary of Energy's natural gas import policy guidelines 2/ to form the basis for its decision because they were not promulgated as a substantive rule under the Administrative Procedure Act;3/ (2) the ERA did not enforce its own procedural rules to require Northridge to present specific details and facts on individual transactions necessary for proper evaluation of the import proposal by participants or the ERA; (3) Northridge failed to establish that the gas is needed; (4) the ERA failed to consider the harm to domestic gas exploration and reserves caused by granting the application; (5) Northridge's fee for acting as a middleman between Canadian producers and domestic purchasers will not be subject to regulation by either Canada or the United States, thereby creating a "regulatory gap" which, according to PPROA, has been condemned by the courts in a long line of cases beginning with Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Company;4/ and (6) the ERA failed to hold a trial-type hearing on the contested issues in dispute.

II. Discussion of Issues

A. The ERA did not rely upon the import policy guidelines as if they were a substantive rule.

We agree with PPROA that the policy guidelines do not have the effect of a substantive DOE rule, which can be issued only pursuant to a rulemaking proceeding. Formulated in large part on the basis of public comments,5/ the policy statement instead serves as a discretionary guide and advance notice to the public of the manner in which the Department has decided to exercise its responsibility under Section 3 of the Natural Gas Act (NGA) to maintain the public interest in international gas trade. The policy recognizes the growing competitiveness of gas markets in the U.S. and the economic distortions created by unnecessary government over-regulation and intervention in those markets. The policy reflects a belief that "competitive import arrangements are an essential element of the public interest,"6/ and that the parties to commercial arrangements, if permitted to negotiate free of government constraints, will structure competitive arrangements which will be market-responsive over their term. Consistent with this belief in the operation of the marketplace, the policy creates certain rebuttable presumptions and allocates the burden of proof on certain issues in import proceedings. In sum, the policy provides a general framework for the ERA in approaching its statutory responsibilities, which ultimately are resolved, in each case, on the specific record.

The decision on the Northridge application was based on the facts of the arrangement, as a whole, the record, as a whole, and precedents involving similar cases,7/ not on any application of the policy as a rule.

B. Northridge's application is sufficient.

The ERA's administrative procedures require applicants to file certain information to the extent such information is applicable 8/ in a particular case and thus contemplates the flexibility which is necessary to adjust to a changing gas market. The specific information PPROA would require Northridge to submit is not applicable to the nature of the quick, short term, spot transactions contemplated and thus is not necessary for the ERA to make its public interest determination. Northridge's application complied with the ERA's administrative procedures.

C. Northridge established (and the record supports) a need for this gas.

PPROA cites West Virginia Public Service Commission v. DOE 9/ in asserting it must be demonstrated that an import would not adversely affect the development of proximate domestic supplies before an application can be

approved and that the security of supply, effects on the U.S. balance of payment, the national and regional needs and costs should also be considered. The conclusion reached by PPROA is incorrect. First, PPROA misinterprets the court opinion. The court concluded that the ERA's findings in its December 1979 decision granting import authority in Columbia LNG Corporation, et al 10/ were not based on substantial evidence. The court did not say that the DOE policies and criteria were unalterable, only that its findings must be supported by evidence. Further, the criteria that the court specified must play a part in the ERA's decisions on import applications originated from DOE natural gas policy then in effect, and the then existing delegation order from the Secretary of Energy, which gave the ERA its authority over imports.11/

As we stated in Order No. 88, it is DOE policy to foster full development of a spot market in order to help achieve the goal for imports of having a supply of natural gas supplemental to domestic production available on a competitive basis.12/ The considerations currently applicable to reviewing import arrangements are contained in the policy guidelines and DOE Delegation Order No. 0204-111.13/ Of prime concern are competitiveness of the import, need for the natural gas, and security of the import supply.

With respect to PPROA's contention that Northridge has failed to establish need for the gas, the ERA has made it clear that need is addressed in terms of marketability of the proposed import.14/ Thus, if the imported gas is competitive in the proposed market area and, through its contract terms, will remain competitive throughout the contract period, then there is a rebuttable presumption the gas is needed in the market.

Under the arrangement proposed by Northridge, the importation and sale would not take place at all if the gas was not marketable, competitively priced, and needed. PPROA has failed to demonstrate the transactions conducted under this blanket authorization would not be competitive, and thus failed to rebut the presumption the gas is needed.

D. The ERA considered the impact the import will have on development of domestic supplies.

PPROA's concern that Northridge's import will have a "dampening effect" on domestic gas exploration in the Southwest reflects a legitimate concern by domestic producers about their ability to market their gas. Yet, rejection of this import would not solve the problems faced by these producers. The decline in gas exploration may indicate that takes from domestic producers are influenced by the price they charge as much as by factors relating to this Canadian gas import. The ERA believes participants in the changing natural gas

market must be sufficiently flexible to respond to competition in order to retain market positions. It is important that neither domestic nor imported supplies are discriminated against in order to foster the competition that will benefit the gas industry and consumer alike. The appropriate recourse for PPROA's members is to make their gas more marketable, not to seek to limit competition in the marketplace.

E. The grant of Northridge's application does not create a regulatory gap.

PPROA alleges Northridge's arrangement, under which it will buy short-term Canadian gas supplies for resale to U.S. purchasers, injects an unnecessary middleman into the domestic spot market whose fee will not be subject to regulation by either Canada or the U.S. Supposedly, this creates some kind of "Attleboro gap." As an alternative, PPROA recommends that Canadian producers sell directly into the domestic spot market "without subjecting them to intermediaries such as Northridge."15/ In its application for rehearing, PPROA also maintains that the ERA has selectively limited the issuance of blanket import authorizations to a few companies rather than making them widely available to all potential importers.

Absent evidence to the contrary, import contracts are assumed to be freely negotiated. Under such a basic assumption, all parties to the agreements are further assumed to make business decisions they consider in their own best interest. No evidence has been presented that either producers or purchasers are being "subjected" to an intermediary or forced to have a broker in this case or in any other ERA authorized spot market sales arrangement.

PPROA's Attleboro gap argument makes very little sense. The case tested the constitutional validity of a state order affecting interstate commerce and does not apply to an import situation. Notwithstanding, the import price paid by Northridge is subject to ERA jurisdiction whether or not it contains a commission. Furthermore, payment of any such commission, if included in the price to Northridge's customers, is a business decision to be left to the contracting parties. If the delivered cost for the imports in the markets served is not competitive with other available supplies, the transaction would presumably not take place.

PPROA's assertion that the ERA has in some way prohibited the majority of potential importers from applying for blanket authority and prevented Canadian producers from participating in the U.S. spot market is unfounded. One has only to look at the record on how we have reacted in approving all forms of spot market and short-term import proposals to know we are not

discouraging any party that satisfies the requirements of 10 CFR 590.202(c) from filing an application for blanket or spot sales authority.16/

F. The NGA does not require a trial-type hearing on Northridge's application.

According to PPROA, before the ERA can decide this case it must, under Section 3 of the NGA, give an opportunity for trial-type hearing of the allegedly contested issues. PPROA implies that the ERA is required to hold trial-type hearings in all cases. We disagree. The Federal Register notice of this application provided the opportunity for hearing required by Section 3 of the NGA. The ERA has authority to dispose of issues without a trial-type hearing where, as here, there are no material facts substantially in dispute.17/ The arguments set forth by PPROA relate to matters of policy, not disputed fact. The ERA is not required to hold trial-type hearings to resolve policy disputes, nor would it be productive to have done so in this case.

III. Conclusion

The ERA has determined that PPROA's application for rehearing presents no information that would merit reconsideration of our findings in Order No. 88. Accordingly, PPROA's petition for rehearing and its request for stay of the order are denied.

Order

For the reasons set forth above, pursuant to Sections 3 and 19 of the Natural Gas Act, it is ordered that:

The application for rehearing of Panhandle Producers and Royalty Owners Association and request for stay are hereby denied.

Issued in Washington, D.C. on November 27, 1985.

--Footnotes--

1/ See Northridge Petroleum Marketing U.S., Inc., 1 ERA Para. 70,605 (September 27, 1985).

2/ 49 FR 6684, February 22, 1984.

3/ 5 U.S.C. Sec. 553.

4/ 273 U.S. 83 (1927).

5/ Public participation in DOE's gas import policy review undertaken in 1983 came primarily through two conferences held in January and September. See 47 FR 57756, December 28, 1982, and 48 FR 34501, July 29, 1983.

6/ 49 FR 6687.

7/ See Cabot Energy Supply Corporation, 1 ERA Para. 70,124 (February 26, 1985); Northwest Alaskan Pipeline Company, 1 ERA Para. 70,585 (February 26, 1985); Tenngasco Exchange Corp. and LHC Pipeline Company, 1 ERA Para. 70,596 (May 6, 1985); Dome Petroleum Corporation, 1 ERA Para. 70,601 (July 2, 1985); U.S. Natural Gas Clearinghouse, Ltd., 1 ERA Para. 70,602 (July 5, 1985).

8/ 10 CFR 590.202.

9/ 681 F.2d 847 (D.C. Cir. 1982).

10/ See Columbia LNG Corporation, Consolidated System LNG Company, Southern Energy Company, 1 ERA Para. 70,110 (December 29, 1979).

11/ Delegation Order No. 0204-54, 44 FR 56735 (October 2, 1979).

12/ In Increasing Competition in the Natural Gas Market; Second Report Required by Section 123 of the Natural Gas Policy Act of 1978, summitted in January 1985, the DOE observed that an active spot market will allow the natural gas market to allocate risks efficiently and will help minimize price and supply fluctuations as the market moves from a tightly regulated environment towards fully competitive market conditions. See Summary, at S-1, S-5, and Ch. 6, at 75.

13/ See note 2, supra.

14/ See e.g. Northwest Alaskan Pipeline Company, 1 ERA Para. 70,579, Para. 70,580 (December 13, 1984); Cabot Energy Supply Corporation, supra, note 7; Southeastern Michigan Gas Company, 1 ERA Para. 70,595 (April 29, 1985); Czar Resources Inc., 1 ERA Para. 70,598 (June 3, 1985); Dome Petroleum Corporation, supra, note 7; U.S. Natural Gas Clearinghouse, Ltd., supra, note 7.

15/ Application for rehearing, at 11.

16/ See e.g. Reichhold Chemicals, Inc., 1 ERA Para. 70,570 (September 14, 1984); The Washington Water Power Company, 1 ERA Para. 70,572 (October 31, 1984); Northwest Natural Gas Company, 1 ERA Para. 70,577 (December 10, 1984);

Cascade Natural Gas Corporation, 1 ERA Para. 70,578 (December 10, 1984); J.R. Simplot Company, 1 ERA Para. 70,587 (February 26, 1985); Czar Resources Inc., 1 ERA Para. 70,593 (April 24, 1985); Tenngasco Exchange Corp. and LHC Pipeline Company, supra, note 7; Bethlehem Steel Corporation, 1 ERA Para. 70,600 (June 3, 1985); Dome Petroleum Corporation, supra, note 7; U.S. Natural Gas Clearinghouse, Ltd. supra, note 7; Westcoast Resources, Inc., 1 ERA Para. 70,606 (September 27, 1985).

17/ See 10 CFR 590.313.