Cited as "1 ERA Para. 70,646"

Texas Eastern Transmission Corporation (ERA Docket No. 85-13-NG), May 21, 1986.

DOE/ERA Opinion and Order No. 112A

Order Denying Rehearing

I. Background

On April 24, 1981, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 32 (Order No. 32) to Texas Eastern Transmission Corporation (Texas Eastern), Natural Gas Pipeline Company of America (Natural), Michigan Wisconsin Pipe Line Company (now ANR Pipeline Company) (ANR), and Tennessee Gas Pipeline Company (Tennessee). Order No. 32 authorized Texas Eastern to import up to 75,000 Mcf per day of Canadian natural gas from ProGas Limited through October 31, 1987. The authorizations issued to Natural, ANR, and Tennessee are not involved in this proceeding.1/ On March 21, 1986, the ERA issued DOE/ERA Opinion and Order No. 112 (Order No. 112) deferring action on Texas Eastern's request for an extension of its existing authorization to October 31, 1989,2/ and approving an amendment to Order No. 32 authorizing Texas Eastern under a renegotiated contract with ProGas to continue to import up to 75,000 Mcf per day of Canadian natural gas through October 31, 1987.

II. Application for Rehearing

On April 22, 1986, the Panhandle Producers and Royalty Owners Association (PPROA) filed an application for rehearing of Order No. 112. The application also seeks a stay of the order pending rehearing and judicial review of any ERA order on 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 policy guidelines 3/ as if it were a substantive rule creating a presumption of need upon a showing of competitiveness because the guidelines were not promulgated as a substantive rule under the Administrative Procedure Act (APA); (2) the ERA failed to consider developments in natural gas markets and in Canadian import policies that occurred while Texas Eastern's application was pending before the ERA; (3) the ERA failed to hold a trial-type hearing to resolve contested issues of material fact placed in dispute by PPROA as required by the Natural Gas Act (NGA) and APA; (4) Texas Eastern failed to establish a need for the imported

gas under the criteria discussed in West Virginia Public Service Commission v. DOE and DOE/ERA Opinion and Order No. 3 4/ and as required by the NGA; (5) the ERA failed to consider the harm to domestic natural gas development and exploration over the long term; and (6) the ERA lacks the authority to impose "as billed" rate treatment on the FERC.

III. Decision

PPROA makes six contentions of error in this proceeding in support of its request for rehearing. First, PPROA argues that the ERA erred in relying on the DOE policy guidelines as a substantive rule. This issue has been fully considered in response to PPROA comments and rehearing requests in the Northridge and Northwest cases.5/ No new matters have been presented on this issue in this proceeding. As we stated in these earlier cases, the ERA has not relied upon the DOE policy guidelines as a substantive rule. The guidelines merely established the framework and order of proceeding in this docket. The decision rendered in the instant case was based on consideration of the entire record as a whole and upon a determination that, under Section 3 of the NGA, Texas Eastern's renegotiated import arrangement should be approved in the absence of an affirmative demonstration showing that it would be inconsistent with the public interest.

Second, PPROA contends that the ERA erred in failing to consider recent developments in the natural gas market and changes in Canadian export policy which occurred while Texas Eastern's application was pending. This is not true. These events were considered by the ERA as part of its review of the entire record in this proceeding. While the ERA was not convinced that these events merited disapproval of Texas Eastern's application with respect to gas already authorized for import, the ERA deferred taking action on Texas Eastern's request for an extension of its authorization in part because of these changed circumstances. The procedural order issued concurrently with Order No. 112 requests Texas Eastern to provide additional information and affords the other parties to this proceeding the opportunity to comment on how recent market developments and Canadian policy changes would effect the proposed extension of Texas Eastern's import arrangement.6/

Third, PPROA contends that the ERA erred in not holding a trial-type hearing on "the contested issues of material facts which have been placed in dispute by PPROA." 7/ PPROA also argues that a trial-type hearing is required by law under Section 554 of the APA and Section 3 of the NGA which requires that "opportunity for hearing" be provided. PPROA is incorrect in its contentions. PPROA presented no evidence of disputed issues of material fact relevant to the limited scope of Order No. 112 in comments filed in this

proceeding and has presented no new information in this regard in its application for rehearing. Further, PPROA has not indicated that it has any evidence to present that it could not have presented by written filings. With respect to PPROA's "required by law" argument, the ERA notes that it is hornbook law that the requirements of Section 554 of the APA are only mandatory where a proceeding is required to be held "on the record after opportunity for hearing." Section 3 of the NGA contains no such language.

Fourth, PPROA contends that the ERA erred in concluding that Texas Eastern had established a need for the gas and in considering only the competitiveness of the price for the gas in reaching its conclusion. PPROA argues that the ERA must consider regional and national need, and a number of other factors identified in West Virginia Public Service Commission v. DOE and DOE/ERA Opinion and Order No. 3.8/ It is not true, as contended by PPROA, that the ERA based its conclusion regarding need for the gas solely on the basis of the marketability of the gas. The ERA considered the entire record, including the fact that the issue of need had previously been addressed when the gas was authorized for import in 1981, the presumption which arises that the gas is needed if it is marketable, and the fact that no customer of Texas Eastern had come forth in this proceeding to assert that the gas would not be needed. It is also not true, as contended by PPROA, that the ERA is required to apply criteria in making its decision that were used under a delegation of authority order no longer in effect.9/ The DOE and the ERA clearly have authority to modify criteria and policy with respect to the importation of natural gas. There is nothing in the West Virginia case cited by PPROA which would suggest otherwise.10/

Fifth, PPROA contends that the ERA failed to consider the harm to domestic gas exploration and reserves over the long term. PPROA further argues that the ERA failed to consider the cumulative effect of Texas Eastern's import when added to others recently authorized by the ERA. PPROA is incorrect in its contentions. In evaluating the renegotiated import arrangement, the ERA recognized that the long term effect on domestic supplies was a real concern of domestic producers and, in part for this reason, deferred taking action on Texas Eastern's request for an extension of its authorization pending receipt of additional information.

With respect to gas already authorized for import through October 31, 1987, the ERA had addressed the issue of need for the quantity of gas authorized in Order No. 32. There was no proposal before the ERA to change the level of gas previously authorized for import in connection with the issuance of Order No. 112 during the less than two years remaining on the existing authorization. Further, although in its rehearing request PPROA claims that

the decrease in drilling rig counts in the U.S. indicates a lack of need for Canadian gas supplies, it has failed to provide any evidence to support its conclusory statements. The ERA does not believe that the benefits to consumers of the renegotiated import arrangement under which gas would be supplied at more competitive prices than previously authorized should be denied based on conjecture that the lower priced gas imported under the renegotiated arrangement may contribute to the problems of domestic producers.

Sixth, PPROA contends that the ERA cannot impose "as billed" rate treatment on the FERC. PPROA misinterprets the ERA's decision in Order No. 112 in this regard and the scope of the ERA's Section 3 authority. The ERA has authority under Section 3 of the NGA as delegated by the Secretary to approve international gas supply arrangements and to attach conditions to import authorizations so that an import arrangement will not be inconsistent with the public interest. In issuing Order No. 112, the ERA noted that Texas Eastern's import arrangement was similar to domestic pipeline arrangements that utilize two-part rates and reflect the cost of transportation over long distances. Therefore, the ERA stated in Order No. 112 that it saw no basis for not approving the two-part rate or for denying imported gas the same treatment with regard to as billed passthrough that is available to domestic pipelines. The ERA also referenced the Department's position with regard to the as-billed passthrough issue: 11/

> If the Commission has concerns about the allocation of imported gas costs between demand and commodity charges, it has sufficient authority to take appropriate action. However, as long as the result of international contracts freely negotiated between commercial parties is reasonable and is approved by the Economic Regulatory Administration, we urge regulatory restraint in any unnecessary intrusion into private contractual matters.

Thus, there is nothing in Order No. 112 that would prevent the FERC from exercising authority over ratemaking under Sections 4 and 5 of the NGA while acting consistently with the ERA's decisions and the DOE's policies. PPROA has not presented any new matter in its appeal which would merit further consideration of this issue.

IV. Conclusion

The ERA has considered Texas Eastern's renegotiated import arrangement as part of the entire record in this proceeding and has found it to be a more competitive arrangement and one that offers greater benefits to consumers than the previous arrangement approved in Order No. 32. PPROA has failed to show

that the ERA was in error when it issued Order No. 112 authorizing Texas Eastern to continue to import the gas previously authorized under the renegotiated import arrangement. No new matter is set forth in the PPROA rehearing request that was not considered in issuing Order No. 112. Accordingly, the ERA finds PPROA's application for rehearing to be without merit, and it is denied. Further, PPROA has failed to show in its request for a stay of Order No. 112 that it would suffer any irreparable harm or that it is likely to prevail on the merits of its appeal. Accordingly, PPROA's request for a stay is denied.

ORDER

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

(A) Panhandle Producers and Royalty Owners Association's (PPROA) request for a rehearing of DOE/ERA Opinion and Order No. 112 (Order No. 112) is denied.

(B) PPROA's request for a stay of Order No. 112 pending rehearing and judicial review of ERA's order on rehearing is denied.

Issued in Washington, D.C., on May 21, 1986.

--Footnotes--

1/ Order No. 32 authorized Natural, ANR, and Tennessee each to import up to 75,000 Mcf per day of Canadian natural gas through October 31, 1987.

2/ The ERA has requested comments on Texas Eastern's application for an extension of its existing authorization, along with three other Texas Eastern import applications that are closely intertwined, in a consolidated procedural order, Texas Eastern Transmission Corporation, Order Requesting Certain Additional Information From The Applicant, Providing Opportunity For Further Comment From All Intervenors, And Granting Interventions, ERA Docket Nos. 82-05-NG, et al., unpublished (March 21, 1986).

3/ 49 FR 6684, February 22, 1984.

4/ West Virginia Public Service Commission v. DOE, 681 F.2d 847 (D.C. Cir. 1982); Tenneco Atlantic Pipeline Co., 1 ERA Para. 70,103 (December 18, 1978).

5/ Northridge Petroleum Marketing U.S. Inc., 1 ERA Para. 70,605

(September 27, 1985), rehearing denied 1 ERA Para. 70,610 (November 27, 1985); Northwest Pipeline Corporation, 1 ERA Para. 70,604 (September 10, 1985), rehearing denied 1 ERA Para. 70,609 (November 8, 1985).

6/ See supra note 2.

7/ Application For Rehearing And Request For Stay By The Panhandle Producers And Royalty Owners Association, at 6.

8/ See supra note 4.

9/ The criteria which PPROA would have the ERA apply to this proceeding are set forth in Delegation Order No. 0204-54, 44 FR 56735 (October 2, 1979), an order superseded by Delegation Order No. 0204-111, 49 FR 6684 (February 22, 1984).

10/ See supra note 4.

11/ Comments of the United States Department of Energy, FERC Docket No. RM 85-1-000 (Part D), November 18, 1985, at 7.