Cited as "1 ERA Para. 70,808"

Alenco Resources Inc. (ERA Docket No. 88-08-NG), August 31, 1988.

DOE/ERA Opinion and Order No. 268

Order Granting Blanket Authorization to Import Natural Gas from and Export Natural Gas to Canada and Granting Interventions

I. Background

On February 12, 1988, Alenco Resources Inc. (Alenco) filed an application with the Economic Regulatory Administration (ERA) of the Department of Energy (DOE), pursuant to Section 3 of the Natural Gas Act (NGA), for blanket authorization to import natural gas from Canada for short-term and spot market sales to customers in the U.S. and to export domestic natural gas for short-term and spot sales in Canada. The proposal also contemplates importing Canadian gas which would be re-exported for sale in Canada and exporting domestic gas which would be re-imported for sale in the U.S. Alenco requests authority to import up to 54 Bcf and to export up to 54 Bcf of gas over a two-year term beginning with the date of the first import or export. Alenco, a Delaware corporation, with its principal place of business in Calgary, Alberta, Canada, is an affiliate of two Canadian firms, Alenco Inc. and Alberta Energy Company Ltd. (Alberta Energy).

The imported gas would be supplied primarily by Alberta Energy, but may be obtained from other Canadian sources, for resale to local distribution companies, pipelines, and commercial and industrial end-users. Alenco also plans to serve as an agent both in negotiating for imported gas supplies on behalf of U.S. purchasers and in marketing gas or Canadian producers. Under the export proposal, Alenco would purchase domestic gas from a variety of suppliers for resale in the Canadian short-term and spot markets, or act as agent for the buyer or seller.

No contracts have been executed and therefore the application does not identify the specific buyers or prices. According to Alenco, the specific terms of each import and export would be negotiated on an individual basis, including the price and volumes, and will be based on competition in the marketplace. Sales would typically be on a best-efforts basis. Alenco intends to submit quarterly reports to the ERA describing the import and export transactions into which it has entered. As proposed, this gas would be transported over existing pipeline facilities.

In support of its application, Alenco asserts that the proposed export would benefit the U.S. by helping alleviate a supply surplus that currently exists in certain regions and by reducing the foreign trade deficit. In addition, Alenco asserts that there is no present national need for the gas to be exported. The importation of Canadian gas would provide a competitively priced alternative supply to U.S. consumers. Further, both the imports and exports would reduce unit transportation costs of pipeline systems which deliver the gas.

II. Interventions and Comments

The ERA issued a notice of Alenco's application on March 17, 1988, with protests, motions to intervene, notices of intervention, and comments to be filed by April 18, 1988.1/ Motions to intervene, without comment or request for additional procedures, were filed by El Paso Natural Gas Company, Northwest Alaskan Pipeline Company and Pacific Gas Transmission Company. A motion to intervene by the Producers Associations opposed Alenco's application. This order grants intervention to all movants.

The Producers Associations consist of nine separate groups representing several thousand independent producers, royalty owners, and marketers of natural gas in California, Colorado, New York, Oklahoma and Texas.2/ They request summary denial of the application or, alternatively, request that the ERA either hold a trial-type hearing or impose conditions on the authorization that would (1) require any gas imported under the authorization to be transported through pipelines providing open access transportation under the Federal Energy Regulatory Commission's (FERC) Order No. 436 (subsequently amended by Order No. 500) program, (2) require Alenco to obtain from the FERC a certificate to make sales for resale in interstate commerce, (3) prohibit Alenco from importing the gas under a two-part rate structure, and (4) set a date certain to begin the two-year term. The Producers Associations also request the opportunity to conduct discovery.

Alenco filed an answer challenging the Producers Associations' various requests, including their discovery request which Alenco claims should be denied.3/ Alenco states that the ERA has rejected the Producers Associations' arguments in prior decisions approving blanket import authority and that some of the issues have also been rejected by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit).4/ Therefore, Alenco asserts that these arguments should be rejected again here. Alenco also argues that the conditions that the Producers Associations propose are unnecessary and have consistently been rejected by the ERA. Finally, Alenco urges that the Producers Associations' request for a trial-type hearing be denied because

their arguments relate primarily to established DOE policy, not disputed fact.

III. Decision

The application filed by Alenco has been evaluated to determine if the proposed import and export arrangement meets the public interest requirements of Section 3 of the NGA. Under Section 3, an import or export must be authorized unless there is a finding that it "will not be consistent with the public interest." 5/ The NGA, thus, establishes a presumption in favor of authorizing imports and exports of natural gas.

With respect to imports, the Administrator is guided in making the Section 3 determination by the DOE's natural gas import policy guidelines.6/ Under these guidelines, the competitiveness of an import in the markets served is the primary consideration for meeting the public interest. If a gas import arrangement is sufficiently flexible to allow the buyer to respond to changes in the marketplace throughout the contract term, the gas is deemed to be competitive. This marketability in turn gives rise to a presumption of need for the gas in the markets served.

The import authorization sought by Alenco would provide it with blanket approval, within prescribed limits, to negotiate and transact individual, short-term arrangements without further regulatory action. Alenco proposes an arrangement where each sale would be voluntarily negotiated, short-term, and market-responsive, providing assurance that the transaction will be competitive and would not take place if the gas is not marketable. This arrangement, as set forth in the application, like other blanket imports authorized by the ERA, is inherently competitive. The ERA believes that the enhanced competition such short-term sales bring to the marketplace is beneficial to the public interest because it increases the range of choices available to firms desiring to purchase gas and places downward pressure on prices for consumers.7/

Alenco has also requested blanket export authority. In reviewing natural gas export applications, the ERA considers the domestic need for the gas to be exported, and any other issues determined by the Administrator to be appropriate in a particular case. The current gas surplus, together with the short term requested and the fact that no party has argued that the gas proposed to be exported is needed domestically, indicates that the domestic need for this gas is not currently, and is unlikely to become, an issue during the term of this authorization.

In asserting that this import should be denied or conditioned, the

Producers Associations must persuade the ERA that the arrangement, without the conditions they request, would not be competitive or otherwise would not be in the public interest. The Producers Associations do not make this demonstration. All of the numerous claims made by the Producers Associations in opposition to Alenco's proposal are restatements of arguments previously considered and rejected in earlier ERA proceedings.8/ In addition, many of the issues which are raised have been decided in two cases, Panhandle I, brought before the D.C. Circuit and Panhandle II, brought before the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit).9/ Those cases involved four DOE/ERA opinions and orders granting short-term blanket import authorizations.

A. The Application Should Not Be Summarily Denied.

To support their request for summary denial of Alenco's application, and as the principal, underlying substantive basis for their alternative requests, the Producers Associations argue, as they have previously, that Alenco has failed to meet its burden of proof to demonstrate, with probative and reliable evidence, a need for the gas to be imported under the requested authorization and, therefore, that the ERA does not have sufficient information to make a Section 3 determination.10/ This argument ignores both the statutory burden of proof and the presumptions in the current DOE policy guidelines.

The Producers Associations claim that the policy guidelines cannot lawfully be relied upon in reviewing Alenco's application because they are invalid and because they do not have the effect of a "substantive rule." 11/ As we have emphasized before, the policy guidelines were never intended to be promulgated as a substantive rule by which the ERA would automatically be bound. They were intended to provide the public with a clear indication of those factors that would guide the Administrator of the ERA in making a Section 3 "public interest" determination in each case. They do not require a particular finding and each case ultimately is decided on the facts and record of the individual proceeding. The general policy established by the guidelines is made up of certain rebuttable presumptions and the associated burden of proof. Contrary to the Producers Associations' assertion and, as the D.C. Circuit in Panhandle I emphasized, to say the policy guidelines are not binding is not to say they do not or cannot have substantive effect. The ERA can rely on the policy guidelines, including the presumptions, so long as the guidelines are non-binding and the presumptions are rebuttable.12/ In Panhandle II, the Fifth Circuit similarly held that because the guidelines did not establish a "substantive rule", the ERA is not required to ignore them altogether. Further, the Fifth Circuit stated that the ERA did not give "undue weight" to the guidelines by refusing to reconsider principles which already have been subject to "complete attack" in numerous import cases since 1984.13/

As additional support for their argument, and to "rebut any possible presumption" of need if the policy presumptions are assumed to be valid,14/ the Producers Associations attached to their motion to intervene a statement by David W. Wilson, President of Gas Acquisition Services Inc. and former President of the Independent Petroleum Association of Mountain States. Mr. Wilson argues, and on the basis of his statement the Producers Associations argue, that the domestic gas market is not competitive, and since need is deemed a function of competitiveness under the guidelines, need cannot be presumed.

The ERA has examined Mr. Wilson's statement here and in other proceedings15/ and found that it does not offer relevant information to support the Producers Associations' arguments. The Producers Associations have not rebutted the presumptions nor presented substantial evidence that would provide the Administrator with a basis to find that Alenco's proposal is not competitive or that the gas would not be needed.

By virtue of Mr. Wilson's statement, the Producers Associations 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 and the availability of gas pipeline transportation to the U.S. border.

The Wilson's statement also raises the question of whether the ERA's import authorizations are consistent with the U.S./Canada Free Trade Agreement signed by the President on January 2, 1988, and now awaiting approval by the U.S. House of Representatives and the Canadian Parliament, by giving Canadian imports an unfair competitive advantage over domestic gas. The ERA believes that its import and export policies have provided 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 the 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 merely disagrees with the ERA's, the DOE's and the Administration's policies on imported natural gas.

For the foregoing reasons, the Producers Associations' request for summary denial of Alenco's application is rejected.

B. The Request For Discovery Is Denied.

The Producers Associations request an opportunity to conduct discovery of information allegedly needed to (1) determine the identity of the parties to this proposal; (2) determine the competitive effects of the proposed authorization on domestic producers; and (3) develop data to test the reasonableness of Alenco's claim that the imported gas supplies are needed and cannot be supplied more economically from domestic sources.

The ERA has examined the Producers Associations' request for authorization to conduct discovery to obtain additional information from Alenco. The information requested would not lead to factual evidence that is relevant and material to the issues in this proceeding. Contrary to the Producers Associations' contention, the information supplied by Alenco's application substantially complies with our filing requirements and is sufficient for us to make a public interest determination under DOE import policy and precedent for these kinds of short-term, market-responsive arrangements. The public interest inquiry into the competitiveness of an import or export proposal focuses on whether a freely negotiated arrangement, as proposed and taken as a whole, provides an importer or exporter with flexibility to respond to market changes and thereby enhances competitive pressure on market participants. It does not focus on the competitive effect of an arrangement on domestic producers, nor for that matter on any competitor, nor on whether, in a particular instance, the gas can be supplied more economically by domestic or other suppliers. Accordingly, the Producers Associations' request for discovery is denied.

C. The Request for A Trial-Type Hearing Is Denied.

In the event the ERA does not reject Alenco's application, the Producers Associations contend that the ERA should hold a trial-type hearing to examine numerous, allegedly disputed issues of fact. These issues include the environmental effects of the proposed arrangement (discussed below in section H of this order), security of supply and national security concerns, issues related to the allocation of border facilities, the impact of competition on the domestic gas industry generally, and concerns regarding whether the gas is needed and whether domestic gas is available at lower prices.

The ERA has reviewed the issues raised by the Producers Associations in requesting a trial-type hearing and concludes that, however characterized by the Producers Associations, there are no issues of fact in dispute that are material to resolution of the issues in this proceeding. Their concerns relate to matters which are fundamentally policy, not factual, in nature, and which are not material to the ERA's public interest assessment under the policy guidelines. The Producers Associations' concerns reflect a view of energy policy that departs significantly from the DOE's policy to promote competition, including competition from imported gas, for the ultimate benefit of the consuming public and the energy industry. Moreover, the issues for which the Producers Associations seek a trial-type hearing here are identical to those addressed by the Fifth Circuit in Panhandle II. The court supported the ERA's interpretation in that case that these are not issues involving adjudicative facts and that a trial-type hearing is not required.

D. The Request for Conditions Is Denied.

If the ERA does not deny Alenco's application or schedule a trial-type hearing, the Producers Associations request imposition of four conditions on a grant of import authority. For the reasons discussed below, we deny this request.

The Producers Associations 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 Producers Associations request the ERA to condition any approval of the proposed import on the requirement that any pipeline transporting the imported gas should be an open-access transporter under FERC Order No. 436.16/

The ERA believes that it would be discriminatory to impose an open-access condition on imported, but not 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. The Fifth Circuit in Panhandle II rejected a similar argument that only open-access transporters should be permitted to transport imported gas. The court found that the distribution of imported gas does not provide any greater potential for discrimination than the distribution of domestic gas. Therefore, the court concluded, the open-access condition would discriminate against foreign supplies and lessen competition in the U.S. market.

Second, the Producers Associations seek a condition requiring Alenco to obtain from the FERC a certificate of public convenience and necessity to make sales for resale in interstate commerce. The Producers Associations contend

that such a condition would show that the ERA is not attempting to usurp the certificate jurisdiction of the FERC. The ERA is not willing to impose such a condition. There is no need for the condition requested by the Producers Associations since it is clear that gas would not flow in interstate commerce without appropriate certification. Neither the NGA nor the ERA's regulations limit the ERA's authority to approve import applications to those instances where the FERC already has certificated downstream transportation or sales arrangements. The Producers Associations' argument that the ERA impose such a certificate condition on the import authorization is not persuasive and their request for the condition is denied.

Third, the Producers Associations ask for a condition to prohibit Alenco from importing the gas under a two-part rate structure and to require the price charged under the arrangement to be a single one-part commodity border price. In support of this condition, the Producers Associations suggest that two-part rates for imported gas supplies create a competitive disadvantage for domestic producers who are subject to one-part commodity ceiling prices under the Natural Gas Policy Act.17/

The purpose of a blanket authorization is to allow importers to participate in the spot and short-term market. It is up to the buyers and sellers in spot market transactions to determine how the commodity should be priced. Canadian gas participates in the short-term and spot market no differently than domestically produced gas. The Producers Associations' argument is misleading because they equate a "one-part" wellhead commodity price with two-part rates at the border that recover the cost of gas in the commodity charge and the cost of pipeline transportation of that gas in the demand charge. Two-part rates, to the extent they are used in spot market transactions, are applied no differently to imported gas than they would be to domestically produced gas. Distinctions between rate structures relate to many factors, including services rendered by the pipelines, but not to the source of the gas supply. The ERA will not discriminate against Canadian gas by imposing conditions requiring different rate treatment from domestic gas.

Fourth, the Producers Associations request that the import authorization commence on a date certain. They argue that a two-year term beginning on a date in the indefinite future is tantamount to imposing no term at all on the authorization. The Producers Associations argue that, where the ERA grants a two-year term to begin on the date of the 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. This argument has been considered and rejected by the Fifth Circuit in Panhandle II when it stated, "The ERA's present import policy does not depend upon any

transitory circumstance in the market for natural gas. . . . The more relaxed regulatory approach to short-term import arrangements thus does not seek to correct any prevailing deficiency that might expire with time." 18/ Here, as in those challenged blanket import authorizations, the ERA is denying the request for a condition to begin this import on a date certain.

E. Alenco's Import Proposal Is Not Inconsistent with The Secretary Of Energy's Statement On Lack Of Open-Access Transportation.

The Producers Associations argue that Alenco's import proposal fails to conform to a finding by the Secretary of Energy in March 1987 regarding the lack of a competitive domestic market and allege that the lack of competitiveness is aggravated by preferential treatment for available pipeline transportation arising from affiliated relationships with Canadian suppliers. The Producers Associations have raised this issue in previous proceedings.19/ The Secretary's report on energy security20/ expresses concern that willing buyers and sellers cannot always deal directly with each other because of lack of open-access to transportation. However, in this case, as in the past, the Producers Associations 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 No. 436, which does not differentiate based on source of supply, and DOE has proposed mandatory contract carriage legislation. Alenco's import proposal 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.21/

F. The ERA Is Not Issuing Import Authorizations To "Unnamed Entities."

Alenco has requested that it be allowed to act as agent for others in importing and exporting gas. The Producers Associations argue that "the granting of Section 3 authorization to unnamed entities exceeds the ERA's statutory authority. . . ." As the ERA has stated previously, an import

arrangement where the importer is a broker does not constitute a delegation of Section 3 authority but rather is a determination that the public interest does not rely on whether title to the gas has been taken.22/ We note that Alenco has sole responsibility for the reporting requirements imposed by the ERA on holders of blanket import and export authorizations whether it purchases gas on its own behalf for resale or serves as an agent for the buyer or supplier.

G. An ERA Authorization Subsumes A Finding That The Import Is Not Imprudent.

The Producers Associations request that, in approving Alenco's application, the ERA should disclaim that its decision includes a finding that purchasing gas covered by the authorization is prudent and should declare that jurisdiction to evaluate the prudence of purchasing imported gas rests with the FERC and/or any applicable state regulatory agency. Although the ERA has not made an explicit prudency finding in approving imports under Section 3 of the NGA, a determination that an import arrangement is not inconsistent with the public interest reflects consideration of matters relevant to the prudency of that arrangement and necessarily subsumes a finding that an import is not imprudent.

H. Environmental Determination

Producers Associations claim that the merits of the application cannot be addressed unless the ERA evaluates and documents the environmental effects of granting the proposed import in compliance with NEPA and the DOE's environmental regulations, 10 CFR Part 1021. They argue that the DOE's environmental regulations characterize this application as one that "normally requires an environmental assessment" because, although it does not entail the construction of new facilities, it is beyond the scope of a categorical exclusion.

The ERA has considered this argument previously23/ and concluded, in the context of factual circumstances not materially distinguishable from the facts in this proceeding, that the argument is without merit. DOE guidelines for NEPA compliance24/ 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 Alenco's import proposal would have no significant impact to the physical environment. Producers Associations have inferred only that the ERA should analyze a potential for significant socioeconomic impacts. However, it is well established by both case law and by regulation that socioeconomic impacts, alone, do not establish a basis for requiring an EIS.25/ Therefore, a memorandum to the file was the appropriate level of NEPA compliance when no other concerns involving the physical environment are at issue.26/ Most recently, the Fifth Circuit in Panhandle II affirmed ERA's finding that socioeconomic effects alone are generally outside the concern of NEPA.27/

I. Conclusion

After taking into consideration all of the information in the record of this proceeding, I find that granting Alenco blanket authority to import up to 54 Bcf of natural gas from Canada and to export up to 54 Bcf of natural gas to Canada over term of two years is not inconsistent with the public interest and that the application should be granted.

ORDER

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

A. Alenco Resources Inc. (Alenco) is authorized to import up to 54 Bcf of natural gas from Canada and to export up to 54 Bcf of natural gas to Canada over a two-year period beginning on the date of first delivery.

B. This natural gas may be imported or exported at any point on the international border where existing pipeline facilities are located.

C. Alenco shall notify the Economic Regulatory Administration (ERA) in writing of the date of the first delivery of natural gas authorized in Ordering Paragraph A above within two weeks after deliveries begin.

D. With respect to the imports and exports authorized by this Order, Alenco shall file with the ERA within 30 days following each calendar quarter, quarterly reports indicating whether purchases/sales of imported/exported gas have been made, and, if so, giving by month, the total volume of the imports/exports in MMcf and the average purchase and sales price per MMBtu at the international border. The reports shall also provide the details of each transaction, including the names of the seller(s) and the purchaser(s), including those other than Alenco, estimated or actual duration of the

agreement(s), transporter(s), point(s) of entry, market(s) served and, if applicable, the per unit MMBtu demand/commodity charge breakdown of the price, any special contract price adjustment clauses, and any take-or-pay or make-up provisions.

E. The requests by the California Independent Producers Association, the Energy Consumers and Producers Association, the Independent Oil and Gas Association of New York, the Independent Petroleum Association of Mountain States, the North Texas Oil and Gas Association, the Panhandle Producers and Royalty Owners Association, the West Central Texas Oil and Gas Association, the Independent Petroleum Association of New Mexico, and the East Texas Producers and Royalty Owners Association for dismissal of Alenco's application, a trial-type hearing, a discovery opportunity, and imposition of each of the requested conditions are denied.

F. The motions to intervene as set forth in this Opinion and Order are hereby granted, provided that participation of the intervenors shall be limited to matters specifically set forth in their motions to intervene and not herein specifically denied, and that the admission of such intervenors shall not be construed as recognition that they might be aggrieved because of any order issued in these proceedings.

Issued in Washington, D.C., on August 31, 1988.

--Footnotes--

1/ 53 F.R. 8800, March 17, 1988.

2/ The Producers Associations are the California Independent Producers Association, the Energy Consumers and Producers Association, the Independent Oil and Gas Association of New York, Inc., the Independent Petroleum Association of Mountain States, the North Texas Oil and Gas Association, the Panhandle Producers and Royalty Owners Association, the West Central Texas Oil and Gas Association, the Independent Petroleum Association of New Mexico, and the East Texas Producers and Royalty Owners Association.

3/ The Producers Associations served Alenco with a data request on March 21, 1988.

4/ Panhandle Producers and Royalty Owners Association v. ERA (Panhandle I), 822 F.2d 1105 (D.C. Cir., June 30, 1987).

5/ 15 U.S.C. Sec. 717B.

6/ 49 F.R. 6684, February 22, 1984.

7/ In Increasing Competition in the Natural Gas Market; Second Report Required by Section 123 of the Natural Gas Policy Act of 1978, submitted 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.

8/ See e.g., ANR Pipeline Company, 1 ERA Para. 70,748 (January 22, 1988) rehearing denied, 1 ERA Para. 70,798 (May 25, 1988); Entrade Corporation, 1 ERA Para. 70,761 (March 3, 1988), rehearing denied, 1 ERA Para. 70,744 (May 5, 1988); and Mobil Gas Company Inc., 1 ERA Para. 70,745 (January 6, 1988), rehearing denied, 1 ERA Para. 70,760 (March 7, 1988).

9/ See supra note 4 and Panhandle Producers and Royalty Owners Association v. ERA (Panhandle II), Nos. 87-4146 to 87-4148 (5th Cir., June 28, 1988).

10/ Comments and Petition For Leave To Intervene Of Producer Associations (April 18, 1988), at 5.

11/ As part of their challenge to the ERA's reliance on the policy guidelines, the Producers Associations also claim that the ERA failed in some way to comply with Section 404 of the Department of Energy Organization Act (42 U.S.C. 7174) in promulgating the Secretary's policy guidelines. Section 404 provides for mutual consultation between the ERA and the FERC on certain Secretarial matters of inter-agency concern. The specific mechanisms agreed to by the ERA and the FERC to carry out this consultative process in developing the policy guidelines were not intended to be second guessed by private parties. The FERC was an active participant in the development of the guidelines and, since their issuance, has consistently and expressly acknowledged and followed them as promulgated by the Secretary. See Supplemental Brief Of The Federal Energy Regulatory Commission As Amicus Curiae, February 5, 1987, at 7-8, filed pursuant to an Order of the Court in Panhandle I. Also in Panhandle II, the Court held that the association lacked standing to raise the issue of whether the ERA should have referred the policy statement to the FERC for review.

12/ Panhandle I, at 1110.

13/ Panhandle II, at 4051.

14/ Comments and Petition For Leave To Intervene of Producers Associations, April 18, 1988, at 6.

15/ See ANR Pipeline Company, Order Denying Rehearing, 1 ERA Para. 70,798 (May 25, 1988); EnTrade Corporation, Order Denying Rehearing, 1 ERA Para. 70,774 (May 5, 1988); and Mobil Gas Company Inc., Order Denying Rehearing, 1 ERA Para. 70,760 (March 7, 1988).

16/ 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. Order No. 500 became effective September 15, 1987. Interim rules adopted in FERC Order Nos. 500-B, 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.

17/ 15 U.S.C. 3301 et seq.

18/ Panhandle II, at 4054.

19/ See e.g., ANR Pipeline Company, Order Denying Rehearing, 1 ERA Para. 70,798 (May 25, 1988); EnTrade Corporation, Order Denying Rehearing, 1 ERA Para. 70,774 (May 5, 1988); and Mobil Gas Company Inc., Order Denying Rehearing, 1 ERA Para. 70,760 (March 7, 1988).

20/ Energy Security Report to the President of the United States, U.S. Department of Energy, DOE/S-0057 (March 1987), at 124-125.

21/ Id., at 126.

22/ See e.g., Tennessee Gas Pipeline Company, 1 ERA Para. 70,674 (November 6, 1986); Northridge Petroleum Marketing U.S. Inc., 1 ERA Para. 70,605 (September 27, 1985); and Natural Gas Clearinghouse, Ltd., 1 ERA Para.

70,602 (July 5, 1985).

23/ See ANR Pipeline Company, Order Denying Rehearing, 1 ERA Para. 70,798 (May 25, 1988); EnTrade Corporation, Order Denying Rehearing, 1 ERA Para. 70,774 (May 5, 1988); and Mobil Gas Company Inc., Order Denying Rehearing, 1 ERA Para. 70,760 (March 7, 1988).

24/ Department of Energy Guidelines for Compliance with the National Environmental Policy Act, (52 FR 47662, December 15, 1987).

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

26/ DOE recently proposed to amend its NEPA Guidelines by adding an import/export authorization under Section 3 of the NGA, in cases not involving new construction, to those actions categorically excluded (53 FR 20695, August 9, 1988). This change was effective on an interim basis upon publication of the notice of proposed rulemaking pending final adoption.

27/ Panhandle II, at 4055.