Cited as "1 ERA Para. 70,812"

Northern Natural Gas Company (ERA Docket No. 88-35-NG), September 16, 1988.

DOE/ERA Opinion and Order No. 270

Order Granting Amendment to Authorization to Import Natural Gas and Granting Interventions

I. Background

On June 8, 1988, Northern Natural Gas Company (Northern) 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) to amend its existing authority to import natural gas from its Canadian supplier, Consolidated Natural Gas Limited (Consolidated), at Emerson, Manitoba, to increase its currently authorized import volume from 135,000 Mcf up to 200,000 Mcf per day from September 18, 1988, through October 31, 1989.

Northern is currently authorized under DOE/ERA Opinion and Order No. 76 (Order 76), issued March 29, 1985,1/ to import up to 135,000 Mcf per day of Canadian natural gas at Emerson through October 31, 1989, minus the volumes it elects to import, up to a daily maximum of 67,500 Mcf, at Monchy, Saskatchewan, through the Alaska Natural Gas Transportation System (ANGTS) in accordance with the terms, conditions, and prices of its gas sales contract with Consolidated dated February 24, 1979, as amended. Order 76 granted Northern authorization to import Canadian natural gas pursuant to its amended gas purchase contract with Consolidated that provided a 1984-85 contract year gas price of $3.50 (U.S.) per MMBtu for imported volumes up to 27.375 Bcf and $2.70 (U.S.) per MMBtu for all volumes above that level, subject to a minimum annual take-or-pay obligation of 40.15 Bcf. For subsequent years, the price of the gas and the take-or-pay volumes were to be subject to annual renegotiation.

Since the ERA issued Order 76, Northern and Consolidated amended their gas sales contract four times to reflect changing market conditions and meet Canadian export regulatory requirements. The first amendment dated November 1, 1985, created a two-part rate structure for the 1985/86 contract year. A monthly demand charge of $14.628 (U.S.) per MMcf and a commodity charge of $2.05 (U.S.) per MMBtu was agreed to for that year. Further, the parties agreed to a provision for yearly volume and price negotiation with arbitration. The amendment also provided for a lump-sum payment as a

settlement for take-or-pay obligations covering 1983 and 1984. On March 21, 1986, the parties again amended their contract to provide a flexible commodity charge for the remainder of the 1985/86 contract year to be negotiated at the request of either party rather than the former yearly basis. Another amendment entered into on November 1, 1986, established a pro-rata formula for setting annual contract volumes that permits certain limited "excess gas" and incentive volumes to become available from time to time at a price equivalent to Northern's weighted average cost of domestic gas for the month that these incentive volumes may be offered for sale. These contract amendments contained no new provisions exceeding Northern's existing authorization that required an amendment to the authority granted Northern in Order 76.

Most recently, Northern has entered into a precedent agreement with Consolidated dated June 1, 1988, proposing to increase its daily import volumes from 135,000 Mcf per day to 200,000 Mcf per day thereby exceeding its existing import authority by 65,000 Mcf per day. Accordingly, Northern requests that Order 76 be amended to allow it to import at Emerson, from September 18, 1988, through October 31, 1989, up to 200,000 Mcf per day and up to 73,000,000 Mcf per year minus whatever volumes Northern elects to import through the ANGTS facilities at Monchy. In support of its request, Northern asserts that the additional imported volumes would provide it the flexibility to meet anticipated general system demand. Northern also points out that the volumes, and the prices paid for those volumes, are subject to renegotiation annually to assure Northern the ability to resell such volumes in its markets and to remain price competitive over the requested term. Northern reiterates its past claims for the reliability of its Canadian source of supply and notes that those claims are supported by performance over the years that Northern has imported natural gas from Consolidated.

The ERA issued a notice of Northern's application on July 19, 1988, inviting protests, motions to intervene, notices of intervention, and comments to be filed by August 24, 1988.2/ A motion to intervene and a joint motion to intervene, without comment or request for additional procedures, were filed by Northwest Alaska Pipeline Company, and Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin). Iowa Public Service Company filed a motion to intervene stating support for Northern's requested amendment. A motion to intervene by Producers Associations (Producers) opposed Northern's application. This order grants intervention to all movants.

Producers are comprised here of ten separate associations representing several thousand independent producers, royalty owners and marketers of oil and natural gas in California, Colorado, New York, Oklahoma and Texas.3/ They request that the ERA summarily deny Northern's application for an amended

authorization or, in the alternative, schedule an evidentiary hearing, or condition any authorization upon open access transportation under the Federal Energy Regulatory Commission's (FERC) Order Nos. 436/500 program4/ and the prohibition of a two-part rate. Additionally, Producers assert that the ERA should disclaim any prudence finding, and, further, grant Producers' request for a discovery conference so that they could obtain additional data from Northern not previously furnished in Northern's response to its earlier data request sent to Northern by letter dated August 1, 1988.

On September 2, 1988, Northern filed an answer to Producers' various requests arguing that those requests should be denied and that the ERA should grant its requested amendment without further proceedings or delay. Northern states that Producers' claims have been considered previously by the ERA and rejected, and, moreover, that the two U.S. Courts of Appeals have affirmed orders of the ERA rejecting essentially the same arguments and requests.

II. Decision

The application to amend its existing import authorization filed by Northern has been evaluated to determine if it meets the public interest requirements of Section 3 of the NGA. Under Section 3, an import must be authorized unless there is a finding that it "will not be consistent with the public interest."5/ The Administrator is guided 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 test. Need for the gas and security of supply are also important considerations.

The amended contract provides pricing provisions that are flexible and market sensitive over the remaining 13 months of the existing authorization. This marketability gives rise to a presumption of need for the gas in the markets served. Further, Northern asserts that the additional volumes will be needed to meet peak system demand. This assertion has not been disputed by existing purchasers of Northern.

To prevail in contending that this import should be denied or conditioned, Producers must persuade the ERA that the amended arrangement, if granted without the requested conditions, would not be competitive, needed, or would be dependent on an unsecure source of supply or otherwise would not be in the public interest. The Producers' comments and arguments in support of their position and requests are not persuasive. Producers associations, either singly or jointly as in this intervention, have opposed the ERA's granting of natural gas import authorizations on the basis that imported gas is not needed

in this country at this time and, if it were needed, the ERA could not rely on the DOE policy guidelines for imports as a substantive rule in granting import authorizations. The ERA has addressed and rejected this position and the supporting arguments advanced by producers associations in 18 previous proceedings involving mostly requests for short-term blanket import authorizations. The ERA reviewed and again rejected those arguments and requests in 16 separate rehearing proceedings. Although this proceeding concerns a request to amend an existing long-term authorization, we find no relevant basis for distinguishing these much-explored arguments, and indeed Producers make no such distinction.

On two separate appeals, one to the U.S. Court of Appeals for the District of Columbia Circuit 7/ and another to the U.S. Court of Appeals for the Fifth Circuit,8/ Producers requested court review of the ERA's procedures and its opinion and orders granting four import authorizations. Except for the issue raised here requesting a specific ERA disclaimer of a finding of prudency in the purchase of the import, the issues and requests asserted by Producers and reviewed by one or the other or both of those U.S. Courts of Appeals were either identical or not materially distinguishable from those reasserted here by Producers. Both circuits, upon review, affirmed the ERA's procedures and the actions it took in those cases.

In Panhandle I, the D.C. Circuit found that the ERA, guided by the DOE's import policy guidelines, acted on a case-by-case basis and the ERA's decision in that administrative proceeding "was based on the facts of the arrangement, as a whole, the record as a whole, and precedents involving similar cases, not on any application of the policy statement as a rule." The court rejected Producers' contention that Section 3 of the NGA places the burden of proof on the applicant, and confirmed the statutory presumption in favor of authorization. Further, the court dismissed Producers' claim that the ERA erroneously failed to establish either need or lack of adverse effect on domestic drilling and affirmed the ERA's refusal to grant a trial-type hearing on five alleged disputed issues of fact, three identical to the issues alleged here, on the grounds that the alleged issues were either matters of policy or were only material if examined under the different policy preferred by Producers.

Subsequently, the Fifth Circuit affirmed the ERA's decisions in three other consolidated cases and held that: (1) Producers lacked standing to raise the issue that the ERA should have referred the DOE import policy statement to the FERC for review;9/ (2) the policy statement was not a substantive rule which required following of the rulemaking procedures; (3) the ERA's refusal to impose a condition requiring open access transportation and a condition

limiting the import price of gas to a one-part commodity price at the border was supported by substantial evidence; and (4) the ERA was not required to complete an environmental assessment to determine whether an environmental impact statement was necessary where the imported natural gas would be transported through existing facilities. Further, the court in Panhandle II tracked the D.C. Circuit's decision affirming ERA's position denying the request for a trial-type hearing on seven alleged issues of disputed fact which are variations of five of the six alleged issues raised in this proceeding.

Producers request a trial-type hearing on the basis of the following alleged issues of material fact: (1) whether Northern's proposal is inconsistent with the national security objectives that Section 3 is designed to protect; (2) the identity and security of Northern's Canadian supplies; (3) whether the proposed import price is consistent with the public interest and whether the price will remain competitive for the duration of the authorization; (4) how available capacity at border facilities should be allocated between this authorization and other approved and proposed import volumes; (5) whether domestic gas is available at lower prices than those proposed here; and (6) the relationship between this proposed authorization and Northern's off-system sales authorization granted by the FERC on March 11, 1988, and whether the two-part border price might distort the price conditions established in the FERC order. The ERA has examined the issues raised by Producers and concludes that, although the concerns are presented as factual issues, they do not involve adjudicative facts genuinely in dispute and material and relevant to a decision in this proceeding. Producers speculate without support and their issues are fundamentally policy in nature. The ERA does not believe that Producers have demonstrated that further illumination of these issues would be aided materially by a trial-type hearing nor that such a hearing is necessary to assure the adequacy and fairness of this proceeding. Producers' request is therefore denied.

Further, the ERA finds again that the imported Canadian gas faces no fewer obstacles in moving to market than does domestic gas and that a condition requiring imported gas to use only open access transporters would discriminate against foreign supplies of gas and those requesting to import it. Such discrimination would lessen competition in the market place to the detriment of the consumers. In addition, the ERA finds that the Producers' request for a one-part border price has no merit, and also is discriminatory, in view of the two-part price structuring practices used for years by domestic pipelines and other marketers of gas. Therefore, the Producers' request for conditions is denied.

The ERA also rejects Producers' repeated claim that the ERA must conduct further environmental analysis. Gas imported under the authorization amended by this order will use only existing pipeline facilities, and, contrary to Producers' argument and as most recently affirmed by the Fifth Circuit in Panhandle II,10/ socioeconomic effects alone are generally outside the concern of the National Environmental Policy Act.11/

Producers recommend that the ERA add a disclaimer in any order in this case that the Administrator has made no finding as to whether any particular purchaser is prudent in purchasing gas covered by this authorization and that the ERA declare that that determination is left to the FERC or 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 import arrangement and necessarily subsumes a finding that an import is not imprudent. A disclaimer would be inappropriate and Producers' request is denied.

The only remaining request of Producers is for a discovery conference. By letter dated August 1, 1988, Producers sent a data request to Northern to which Northern responded by a letter dated August 18, 1988. In its four page reply to Producers' nine questions, Northern responded to each question and included two detailed exhibits, one related to pricing provisions and the other, a schedule by category of gas actually taken in the prior year. That schedule sets a base to project estimates for system supply needs over the remainder of the term during which the increased volumes are requested. The ERA concludes that the record, which contains the information in Northern's application and its response to Producers' data request, is sufficient to reach a decision on Northern's requested amendment. Accordingly, Producers' request for discovery is denied.

The ERA has examined and evaluated the record of this proceeding, reviewed the precedents pertaining to the issues in light of Northern's request to amend its existing import authorization as set forth in its application, and finds that Northern's proposed amendment to increase its import authority by an additional 65,000 Mcf per day of Canadian gas in accordance with the terms of its amended gas sales contract with Consolidated for a term beginning September 18, 1988, and ending October 31, 1989, is consistent with the DOE policy guidelines for meeting the public interest test.

The ERA is persuaded that Northern has demonstrated a need for the additional volumes over the requested term because of the peak nature of its markets which are located in the areas where the imported Canadian gas would

be received by Northern's pipeline system, and which have high volume winter requirements with potential high peak days. According to the applicant, the additional imported gas requested here to begin on September 18, 1988, will be needed in the coming months for system supply. Northern asserts that the surplus gas certificate FERC issued Northern at FERC Docket No. CP88-2 permits it to sell gas that is surplus to its system on any day, while the request for these additional volumes is made to increase deliveries in the market areas that experience sharp peaks, particularly during the winter months. Accordingly, the ERA finds that the additional gas is needed for system supply over the short term balance remaining in the import term.

Northern has amended its gas purchase contract over time in an effort to gain more flexibility in its import arrangement and obtain a reasonable purchase price for its supply for the remaining years of the term. The ERA has reviewed Northern's amended purchase contract underlying its import arrangement and finds that it permits Northern the flexibility to compete in the markets served. Producers suggest that the requested new volumes would have a negative effect on Northern's take-or-pay obligation but their concern is speculative. We note that Producers asked Northern the same question in their prior data request to which Northern responded in its August 18, 1988, letter that it "did not expect to incur substantial take-or-pay liability during the period covered by the Amendment in Northern's application."

The ERA finds that the Canadian natural gas supply relied on by Northern is sufficiently secure to meet the continuing commitment of the proposed import over the requested term. Consolidated and TransCanada PipeLines Limited, which, under a gas resale agreement with Consolidated, is a potential supplier of certain volumes of gas for this import arrangement, are both established Canadian suppliers. Accordingly, the ERA finds that this additional import volume of 65,000 Mcf per day beginning September 18, 1988, and ending October 31, 1989, will not lead to any undue dependence on an unreliable source of supply nor otherwise compromise the energy security of the nation.

After taking into consideration all the information in the record of this proceeding, I find that granting the approval of the amendment to Northern's import authorization increasing the volumes from 135,000 Mcf per day up to 200,000 Mcf per day and up to 73,000 Mcf per year at Emerson minus whatever volumes up to 100,000 Mcf per day Northern elects to import through the ANGTS pipeline facilities at Monchy, is not inconsistent with the public interest.

ORDER

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

A. The import authorization previously granted to Northern Natural Gas Company (Northern) in DOE/ERA Opinion and Order No. 76 (Order 76), issued on March 29, 1985, is hereby amended to increase the volumes authorized for import from 135,000 Mcf per day up to 200,000 Mcf per day and up to 73,000,000 Mcf per year at Emerson, Manitoba, minus whatever volumes up to 100,000 Mcf per day Northern elects to import at Monchy, Saskatchewan, through the Alaska Natural Gas Transportation System, beginning September 18, 1988, and ending October 31, 1989, in accordance with the provisions of its gas sales contract dated February 24, 1979, as amended, including the precedent agreement dated June 1, 1988, with Consolidated Natural Gas Limited filed as part of this docket.

B. All other terms and conditions of the authorization contained in Order 76 remain in effect.

C. The requests by the Independent Petroleum Association of America, California Independent Producers Association, Energy Consumers and Producers Association, Independent Oil and Gas Association of New York, Inc., Independent Petroleum Association of Mountain States, North Texas Oil and Gas Association, Panhandle Producers and Royalty Owners Association, West Central Texas Oil and Gas Association, Independent Petroleum Association of New Mexico, and East Texas Producers and Royalty Owners Association for dismissal of Northern's application, a trial-type hearing, discovery, a data request conference, a disclaimer of a finding of prudency and, the imposition of each of the requested conditions are denied.

D. 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 the 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 September 16, 1988.

--Footnotes--

1/ 1 ERA Para. 70,590.

2/ 53 FR 27897, July 25, 1988.

3/ Independent Petroleum Association of America, California Independent Producers Association, Energy Consumers and Producers Association, Independent Oil and Gas Association of New York, Inc., Independent Petroleum Association of Mountain States, North Texas Oil and Gas Association, Panhandle Producers and Royalty Owners Association, West Central Texas Oil and Gas Association, Independent Petroleum Association of New Mexico, and East Texas Producers and Royalty Owners 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 allows 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, 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/ 15 U.S.C. Sec. 717b.

6/ 49 FR 6684, February 22, 1984.

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

8/ Panhandle Producers and Royalty Owners Association v. ERA, 847 F.2d 1168 (5th Cir. 1988) (Panhandle II).

9/ Producers argue that, when promulgating the policy statement, the Secretary failed to comply with the requirement, pursuant to Section 404 of the DOE Organization Act covering rulemaking procedures, to provide the FERC an opportunity to comment before promulgating a substantive rule and therefore the guidelines are a legal nullity. In rejecting Producers' argument, the Court concluded that Producers lack the "injury in fact" to an interest "arguably within the zone of interests" protected by the underlying statute.

The Court stated that Producers "does not persuade us that Congress intended to give remotely affected individuals the right to bring a challenge on the FERC's behalf." The Court noted that it would have made little sense for the ERA to refer the policy statement to the FERC because the statement dealt with issues largely removed from the FERC's jurisdiction.

10/ Panhandle at 4055.

11/ 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.