Cited as "1 ERA Para. 70,836"

Tennessee Gas Pipeline Company (ERA Docket No. 88-43-NG), January 18, 1989.

DOE/ERA Opinion and Order No. 295

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

I. Background

On July 20, 1988, Tennessee Gas Pipeline Company (Tennessee) 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),1/ to amend its authority to import up to 75,000 Mcf per day of "special purchase gas" from its Canadian supplier, ProGas, Ltd. (ProGas), by extending such authority from August 1988 through October 31, 2000.

Tennessee is currently authorized under DOE/ERA Opinion and Order No. 131 (Order 131), issued June 19, 1986,2/ to import up to 75,000 Mcf per day of Canadian natural gas through October 31, 2000, in accordance with the provisions of its November 25, 1985, gas purchase agreement, as amended, with ProGas. Order 131 also permitted Tennessee to assign its rights and obligations with respect to the purchase, receipt and payment for any and all of the gas designated as special purchase gas to third parties through spot sales for a term of two years from the date of first such sale. Special purchase gas is Canadian natural gas that ProGas may offer for sale to Tennessee from time to time under their contract at a commodity charge less than the commodity charge otherwise in effect. Tennessee can buy that gas for its system supply or assign its right to purchase that gas to a third party without forfeiting its rights to credit such volumes toward its take-or-pay obligation.

Tennessee reported that its first purchase of special purchase gas occurred in August 1986. According to Tennessee's quarterly reports filed with the ERA pursuant to the provisions of Order 131, Tennessee has taken three deliveries of special purchase gas to date totaling 2,088,750 Mcf. Tennessee requests the ERA to amend its import authorization under Order 131 by extending its authority to import special purchase gas from August 1988 through October 31, 2000, without amending any other terms and conditions of Order 131. In support of its request for an extension of its blanket-type authorization, Tennessee asserts that the ERA's justification for denial of

its original request for a concurrent term with its regular supply arrangement--the experimental nature of the blanket authorization concept--is no longer valid. Tennessee claims that the short-term blanket import authorization program is no longer experimental and that it has worked well since its inception. In support of this claim, Tennessee cites two examples of cost-saving transactions under this provision, states that the availability of its special purchase gas enhances competition in the market it serves, and notes that two Federal Courts of Appeals have upheld the ERA's blanket import authorization program.

II. Interventions and Comments

The ERA issued a notice of Tennessee's application on August 8, 1988, inviting protests, motions to intervene, notices of intervention, and comments to be filed by September 14, 1988.3/ A motion to intervene, without comment or request for additional procedures, was filed by Long Island Lighting Company. ProGas Limited filed a motion to intervene stating support for Tennessee's requested amendment. A motion to intervene by Producers Associations (Producers) opposed Tennessee's application. On September 15, 1988, Public Service Electric and Gas Company filed a late motion to intervene without comment or request for additional procedures. No delay to the proceeding nor prejudice to any party will result with regard to this late filing. Therefore, the late filing is accepted and 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, New Mexico, Oklahoma and Texas.4/ They request that the ERA reject Tennessee's application to amend its existing 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 program,5/ by prohibiting a two-part rate, by requiring the two-year term to begin on a date certain, and by requiring Tennessee to first obtain a certificate from the FERC to make sales for resale in interstate commerce. Additionally, Producers argue that the ERA should disclaim any prudence finding and, further, grant Producers' request for a discovery conference to enable them to obtain additional data from Tennessee.

III. Decision

Tennessee's application to amend its existing import authorization 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." 6/ The Administrator is guided by the DOE's natural gas import policy guidelines.7/ Under these guidelines, the competitiveness of an import in the markets served is the primary consideration for meeting the public interest test.

The two-year, blanket-type special purchasing arrangement for which Tennessee seeks extended authority is consistent with the DOE policy guidelines. The reasons for approving the provision as part of the original authorization continue to apply to its extension. Sales of such gas, if made available by ProGas, would be voluntarily negotiated, short term, and price competitive, thus providing assurance that the transactions would be competitive. The flexibility and marketability inherent to this blanket provision give rise to a presumption of need for the gas in the markets served. Further, to the extent sales of special purchase gas are credited against Tennessee's minimum volume obligation under its contract with ProGas, this blanket provision enhances the competitiveness of the long-term import arrangement of which it is a negotiated part.

To prevail in contending that this import should be denied or conditioned, Producers must persuade the ERA that the blanket arrangement, if extended without the requested conditions, would not be competitive, or needed, would be dependent on an insecure source of supply, or otherwise would not be in the public interest. The Producers have failed in this effort. They focus largely on issues of need and impact on domestic producers. None of their arguments, including the alleged issues of material fact argued in support of a trial-type hearing and conditions, are being raised or requested for the first time in this proceeding. The ERA has considered and rejected all of these arguments in response to challenges brought by Producers in numerous other blanket import proceedings. Further, the DOE's policy and its application in particular cases by the ERA have been upheld now by two U.S. appellate courts.8/ The ERA has reexamined, but, with the exception of certain matters discussed below, will not address again here Producers' arguments and requested conditions which, as asserted in this docket, have not been materially distinguished or argued any more persuasively than in the past. Based on the ERA's thoroughly and frequently articulated positions in prior proceedings on these issues, the ERA denies Producers' request for dismissal of Tennessee's amendment application and its alternative requests for a trial-type hearing and for conditions.

Producers' request for a discovery conference is also denied. The ERA finds that the record in this docket is sufficient to reach a decision on Tennessee's requested amendment to its existing import authority.

Producers recommend that the ERA add a specific disclaimer in any order in this case stating that "the Administrator has made no finding as to whether any particular purchaser is prudent in purchasing gas covered by this authorization" and that such a "determination has been left to the FERC or applicable state regulatory agency." Producers raised the same matter on three previous occasions in other dockets.9/ Here, as in those cases, an ERA 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' recommendation is rejected.

Producers also argue here that Tennessee's request for extension of the blanket-type import authority through October 31, 2000, overlooks the fact that the Fifth Circuit Court relied on the two-year term provision as a basis for assuring against the kind of long-term price distortions criticized in the 1984 guidelines.10/ Producers therefore contend that the ERA should not extend the blanket provisions for the life of the contract.

Tennessee asserts that its initial request for a term for the blanket-type authorization through October 31, 2000, was denied and a two-year limit imposed because of the experimental nature of blanket import authorizations and the ERA's stated need for a subsequent opportunity to review the impact of the blanket program. In support of its request, Tennessee cites an instance in 1986 when it purchased gas under its special purchase contract provision at a commodity charge of $1.30 per MMBtu that enabled Tennessee to liquidate a sizable take-or-pay obligation resulting in an actual cost of its special purchase gas of less than $.94 per MMBtu paid for its regular purchase gas during the same period. Tennessee also claims that in March of 1988 it released up to 5,000 Mcf per day of gas to ProGas for sale to others which resulted in a $.06 per Mcf credit to Tennessee by ProGas for gas sold under that release. Tennessee argues that the blanket program is no longer experimental, that the program has worked well since its inception, and that two Federal Courts of Appeals have upheld the program.

The ERA agrees with Tennessee that the blanket import authorization program has "worked well" and perhaps is no longer subject to the "experimental" characterization. The underlying conceptual policy and implementing procedures have proven rational and have been upheld judicially. There has been broad participation in and acceptance of the program. It has added competitive pressure to the market to the benefit of importers and consumers.

However, the two-year limitation on blanket authorizations has served another and more important purpose beyond permitting review of an experimental program. The limit protects the public from potential adverse consequences of contractual provisions that are not known and therefore are not scrutinized by the ERA at the time of authorization. Further, neither Tennessee nor any other party has demonstrated that the two-year limitation robs commercial parties of the flexibility to respond to changes in market conditions or otherwise harms the public, including participants in such blanket transactions.

Accordingly, I intend to limit Tennessee's requested extension of its import authorization for the special purchase gas to a successive two-year term beginning on the date of first delivery after the issuance date of this order. However, I emphasize that, in light of the changing nature of the natural gas market and the responsibility of this regulatory body to remain responsive to such changes, the ERA has not here foreclosed future review of the two-year limitation. After taking into consideration all of the information in the record of this proceeding, I find that amending Tennessee's previous authorization by extending for two years, beginning on the date of the first sale after the issuance of this order, Tennessee's authorization to assign its rights and obligations with respect to the purchase, receipt and payment for any and all of the gas designated as special purchase gas to third parties through spot sales pursuant to its agreement with ProGas 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 Tennessee Gas Pipeline Company (Tennessee) in DOE/ERA Opinion and Order No. 131 (Order 131), issued June 19, 1986, is hereby amended to extend for a term of two years beginning on the date of the first sale of such gas after the issuance date of this order authority wherein Tennessee may assign its rights and obligations with respect to the purchase, receipt and payment for any and all of the gas designated as special purchase gas to third parties through short-term, spot sales.

B. Tennessee shall notify the Economic Regulatory Administration in writing of the date of first delivery of special purchase gas authorized in Ordering Paragraph A above within two weeks after the date of such delivery.

C. All other terms and conditions of the import authorization contained

in Order 131 remain in effect.

D. 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 Tennessee's application, a trial-type hearing, discovery conference, a disclaimer of a finding of prudency, and imposition of each of the requested conditions are denied.

E. The motions to intervene, as set forth in the 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 January 18, 1989.

--Footnotes--

1/ 15 U.S.C. Sec. 717b.

2/ 1 ERA Para. 70,654 (June 19, 1986).

3/ 53 FR 30710, August 15, 1988.

4/ 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.

5/ 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 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.

6/ See supra note 1.

7/ 49 FR 6684, February 22, 1984.

8/ See Panhandle Producers and Royalty Owners Association v. ERA, 847 F.2d 1168 (5th Cir. 1988). The court stated there that "the presumptions set forth in the 1984 Guidelines have been subject to complete attack in the scores of import applications considered by the ERA since 1984. See, e.g., Northwest Alaskan Pipeline Co., 1 ERA Para. 70,585 (1985); Cabot Energy Supply Corp., 1 ERA Para. 70,124 (1985). The ERA did not give the Guidelines undue weight by refusing endlessly to reconsider the principles established in those cases." See also, Panhandle Producers and Royalty Owners Association v. ERA, 822 F.2d 1105 (D.C. Cir. 1987).

9/ EnTrade Corporation, 1 ERA Para. 70,774 (May 5, 1988), Alenco Resources Inc., 1 ERA Para. 70,808 (August 31, 1988) and, Northern Natural Gas Company, 1 ERA Para. 70,812 (September 16, 1988).

10/ Comments and Petition For Leave To Intervene of Producers Associations, at 13.